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PREFACE TO THE FOURTH EDITION.

THIS Edition has been carefully revised. The general arrangement of subject matter adopted in the previous edition remains unchanged, but considerable alterations in and additions to some of the chapters have been made.

Chapter IV. has been almost entirely re-written, and, it is hoped, may now serve as a useful introduction to the discussion of the many difficult questions relating to the rights and obligations of the personal representative in regard to real estate which are subsequently dealt with.

Chapter IX. has been remodelled upon a more simple plan than seemed feasible during the continuance of the controversy so long maintained upon the construction of Hinde Palmer's Act.

Part I. of the Land Transfer Act, 1897, and Section 10 of the Judicature Act, 1875, are

other enactments which have received judicial construction during the interval which has elapsed since the previous edition.

A full discussion of the many recent decisions relative to the incidence of the various death duties and a more complete statement of the law relating to the power of appropriation in favour of particular legatees are among the more important additions to the text of the later chapters.

My acknowledgments are due to the assistance derived from a perusal of Tristram and Coote's Probate Practice (14th ed.), in revising that portion of the Work dealing with the grant of letters of administration.

F. T. M.

LINCOLN'S INN,
October 24th, 1907.

PREFACE TO THE THIRD EDITION.

THE increased scope and altered arrangement of the book in its present form are the outcome of a suggestion made by the late Mr. L. G. G. ROBBINS shortly before his death, that the substance of his treatise on the Devolution of Real Estate should be incorporated in a work embracing the whole of the Law relating to Real and Personal Assets. The Devolution of Real Estate is a branch only, though an important branch, of the general Law of Assets; and it was Mr. ROBBINS' view that, having regard to the important changes in that branch of the law introduced by the provisions of the Land Transfer Act, 1897, a logical arrangement of the whole subject in one volume should prove of value.

As regards arrangement of subject matter, the book is divided into four parts. The first part deals with the creation of the offices of executor and administrator, and indicates the nature of the trust of administration subject to which the real and personal estate of a deceased person now devolve upon his personal representative. The second and third parts deal respectively with the administration of the estate in payment of debts and the distribution of the surplus remaining after payment of debts, among the

persons by law entitled thereto,—in other words, with the execution of the trust of administration as regards creditors, and as regards beneficiaries. In the fourth part, which deals with the liability of the representative, care has been taken to distinguish between the nature of the representative's liability in respect of his own or the deceased's contracts and torts, and his liability for default arising upon any breach of the trust of administration reposed in him.

Where, as upon some questions of construction arising under the Land Transfer Act, 1897, and, in particular, upon the question as to the effect of that Act upon the nature of real assets, I have had occasion to differ from the view expressed in former editions, I have done so with the greatest diffidence and not without the most careful deliberation.

Although myself entirely responsible for the arrangement and added matter of the book in its present form, I desire to acknowledge my indebtedness for such material collected by the late Mr. L. G. G. ROBBINS, as was left at my disposal.

My best thanks are due to Mr. H. J. MONGAN, Mr. EDWARD BATESON, and Mr. ROWLAND POWELL-WILLIAMS, all of the Equity Bar, for the assistance which they have rendered me in preparing this book for the press.

F. TRENTHAM MAW.

LINCOLN'S INN,
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ADDENDA ET CORRIGENDA.

Pages 188, 409, 417.—See now the Married Women's Property Act, 1907 (7 Edw. 7, c. 18).

Page 371.—Note (*m*), *for* 4 Beav. *read* 27 Beav.

To face Page 1.

DEVOLUTION OF REAL ESTATE

AND

ADMINISTRATION OF ASSETS.

PART I.

DEVOLUTION.

CHAPTER I.

OF THE OFFICE OF REAL AND PERSONAL REPRESENTATIVE.

Personal representative.

THE expression "personal representative" is used to denote the executor or administrator of a deceased person (*a*), and is so defined in the Land Transfer Act, 1897 (*b*).

Executor.

Among early writers, an "executor" in a large sense, is taken for any one that is appointed to have the disposition and ordering of the goods and chattels of a man that is dead, or some of them (*c*). In this sense, the term "executor" would include, not only a

(*a*) *Saberton* v. *Skeels*, 1 Russ. & M. 587; *Stockdale* v. *Nicholson*, L. R. 4 Eq. 359.

(*b*) 60 & 61 Vict. c. 65, s. 24 (2); *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58; *Re Cohen's Executors and London County Council*, [1902] 1 Ch. 187.

(*c*) Shep. Touch. (ed. Preston), p. 400.

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"personal representative," but also the bishop or ordinary in whom the right to grant administration was formerly vested (*d*).

An "executor," strictly and properly so called, is said to be *testamentarius*, and is defined in the Touchstone as "one appointed by a man's last will and testament to have the disposing and administration of all or a part of a man's goods and chattels, and to perform a man's last will and testament, according to the contents thereof" (*e*).

Executor according to the tenor.

Consistently with the above definition, it will be found that a person may, by a will, be constituted executor in many ways and by divers words of implication, although not expressly named "executor" therein. "If by any word or circumlocution the testator recommend or commit to one or more the charge and office which pertains to an executor, it amounteth to as much as the ordaining or constituting him or them to be executors" (*f*).

The appointment of a person to be "executor" by that description is the usual and proper mode of constituting him executor. A person appointed executor by implication by reference to the duties to be performed by him, is termed an executor according to the tenor (*g*).

A person will be held an executor according to the tenor if upon a reasonable construction of the will it appears that the essential duties of an executor, viz., to collect the assets of the deceased, to pay his funeral expenses and debts, and to distribute the residue of his

(*d*) Shep. Touch. (ed. Preston), p. 400; Wentw. Off. Ex. (14th ed.), p. 473; Godolph. (3rd ed.), p. 75. See *post*, p. 34.

(*e*) Shep. Touch. (ed. Preston), p. 401. See Wentw. Off. Ex. (14th ed.), p. 3.

(*f*) Wentw. Off. Ex. (14th ed.), pp. 20, 21.

(*g*) *Grant* v. *Leslie*, 3 Phil. 116.

estate, are by the will assigned to him (*h*). Thus, a devise and bequest to trustees of all the real and personal estate of the testator, upon trust to apply the income thereof as therein mentioned, and to distribute the residue subject to the payment of debts, was held to constitute them executors according to the tenor (*i*). So, also, persons nominated trustees "to hold and administer in trust all my estate" (*k*), "to carry out this will," and "for the due execution of this my will," have been held executors according to the tenor (*l*).

The mere appointment of a person to be "trustee" will be sufficient to constitute him executor according to the tenor, if it is sufficiently clear that the word "trustee" was used indifferently for "executor" (*m*); but unless it can be gathered from the terms of the will that the testator intended that the person named as trustee should pay the debts and legacies under the will, he cannot be held to be executor (*n*).

A person made universal legatee was at one time regarded as executor according to the tenor (*o*), and as such was admitted to probate of the will; but the settled practice of the Court of Probate, as well as of

(*h*) *In the Goods of Montgomery*, 5 N. C. 99; *In the Goods of Collett*, Deane, 274; *In the Goods of Adamson*, L. R. 3 P. & D. 253; *In the Goods of Lush*, 13 P. D. 20; *In the Goods of Wilkinson*, [1892] P. 227. As to the effect of a simple direction to a stranger to pay the testator's debts, see *In the Goods of Pamela*, [1902] P. 114.

(*i*) *In the Goods of William Bell*, 4 P. D. 85. See also *In the Goods of Baylis*, L. R. 1 P. & D. 21.

(*k*) *In the Goods of Way*, [1901] P. 345. See Wentw. Off. Ex. (14 ed.), p. 20.

(*l*) *In the Goods of Russell*, [1892] P. 380; *In the Goods of Laird*, *ib.*

(*m*) *In the Goods of Rufus Kirby*, [1902] P. 188. *Cf. In the Goods of Earl of Leven and Melville*, 15 P. D. 22.

(*n*) *In the Goods of Punchard*, L. R. 2 P. & D. 369; *In the Goods of Lowry*, L. R. 3 P. & D. 157. Compare the case instanced by Godolph. (3rd ed., p. 83) of an appointment of two persons to be "executors" followed by a direction that other persons should have the administration of the estate.

(*o*) Godolph. (3rd ed.), pp. 80, 83; Swinb. (7th ed.), pp. 350, 605; *Androvin* v. *Poilblanc*, 3 Atk. 299.

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the Probate Division of the High Court, in such cases, has been to refuse probate and to grant letters of administration with the will annexed (*p*). The same practice now prevails, notwithstanding the recent alteration in the law of devolution of real estate, in the case of a person appointed universal legatee and devisee (*q*).

Administrator.

An "administrator" is said to be *dativus*, and has been defined to be "one that hath the goods and chattels of a man dying intestate, or some of them, committed to his charge by the ordinary for want of an executor" (*r*).

Intestate.

The expression "intestate" in the above definition means "intestate either in deed or in law." A man is said to die intestate in deed, if he dies without having made a will, or having made a will which at his death has become entirely inoperative (*s*); and to die intestate in law if he dies having made a will but without naming any executor, or naming executors who predecease him, or are otherwise incapable of acting, or who, though capable of acting, expressly or impliedly refuse probate, or die without having obtained probate (*t*). So it is said that where an executor proves a will and afterwards dies intestate, the testator is intestate from the time of the executor's death (*u*).

Intestacy in deed is also commonly distinguished from intestacy in law, as actual intestacy as opposed to quasi-intestacy.

(*p*) See *post*, pp. 43, 44.

(*q*) *In the Goods of Pryse*, [1904] P. 301 [C. A.].

(*r*) Shep. Touch. (ed. Preston), p. 401. To "goods and chattels" must now be added "real estate."

(*s*) *Re Ford, Ford* v. *Ford*, [1902] 2 Ch. 605 [C. A.].

(*t*) Shep. Touch. (ed. Preston), p. 462; 11 Vin. Abr. 78; Wentw. Off. Ex. (14th ed.), p. 472; *Graysbrook* v. *Fox*, Plowd. 281, 282.

(*u*) *Graysbrook* v. *Fox*, *supra*.

Comparison of offices of executor and administrator.

The offices of executor and administrator, although they are differently derived, are created for a similar purpose, namely, the due administration of the estate of a deceased person, and are accordingly of the same nature. Executors and administrators alike represent the persons of their testators or intestates; and the powers and duties incident to the office of executor coincide, as a general rule, with those incident to the office of administrator, at any rate, up to the point of final distribution among beneficiaries (*x*).

Office of executor may be limited.

The "power, benefit and charge" of an executor in respect of personal estate, may be limited by the will, to property of a particular nature, or situate in a particular place, or may be limited in point of time, or made conditional only (*y*).

Thus, in the first place, a testator may make A. his executor for his plate and household stuff, B. his executor for his sheep and cattle, C. his executor for his leases and estates by extent, and D. his executor for the debts due to him. Secondly, A. may be made executor for the testator's goods in Cornwall, B. for his goods in Devon, and C. for his goods in a third county. Thirdly, a testator may make his wife his executrix during her widowhood, or during his son's minority. And, lastly, a person may be appointed to be executor conditionally, as if he shall be in England at the time of the testator's death, or in case of the absence abroad of another person primarily appointed (*z*).

Whether upon the death after taking out probate of a person primarily appointed executor, the person

(*x*) Shep. Touch. (ed. Preston), pp. 401, 475; 2 Bla. Com. (10th ed.), p. 507; *Blackborough* v. *Davis*, 1 P. Wms. 43.

(*y*) Wentw. Off. Ex. (14th ed.), pp. 22—31; Shep. Touch. (ed. Preston), p. 460; Godolph. (3rd ed.), pp. 77—80; Swinb. (7th ed.), p. 600.

(*z*) *In the Goods of Langford*, L. R. 1 P. & D. 458.

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conditionally appointed will be entitled to administer the estate, will depend upon the intention of the testator appearing upon the true construction of the will (*a*).

General and special executors.

Where an executor is appointed of the whole will, or of all the testator's goods, or indefinitely, he is termed "universal," or, at the present day, more commonly "general" executor. On the other hand, a person appointed to be executor of the will as to some particular thing, or as to some specified part of the testator's estate, is termed "particular," or, at the present day, more commonly "special" executor (*b*).

Although the appointment indefinitely of a person to be executor constitutes him universal or general executor, the appointment may be limited by other directions in the will; but they must be clear, either by express words or certain implication, to be limitations on the rights of the executor (*c*).

The appointment of a general executor and of a special executor in the same will was, for some reason, regarded by the civil law as "most improper" (*d*); but this form of appointment is nevertheless perfectly valid (*e*), and is now commonly adopted (*f*).

Office of administrator may be limited.

Just as the power of an executor may be limited by the will, so the authority of an administrator may be limited by the terms of the grant of administration.

Administration may be limited (*g*) by the special terms of the grant, to certain specific effects, as a term

(*a*) *In the Goods of Foster*, L. R. 2 P. & D. 304. See *In the Goods of Lighton*, 1 Hag. Ec. Rep. 235.

(*b*) Godolph. (3rd ed.), p. 79; Swinb. (7th ed.), pp. 600 *et seq.*

(*c*) *Lynch* v. *Bellew*, 3 Phillim. 424, 432. See *Rose* v. *Bartlett*, Cro. Car. 292.

(*d*) Godolph. (3rd ed.), p. 83. (*e*) *Lynch* v. *Bellew*, *supra*.

(*f*) 2 Key & Elphinstone's Prec. in Conveyancing (8th ed.), p. 697. See *Re Parker's Trusts*, [1894] 1 Ch. 707; *Re Cohen's Executors and London County Council*, [1902] 1 Ch. 187.

(*g*) See more fully as to limited grants, *post*, pp. 45 *et seq.*

of years (*h*), or to property situate in a particular country or place (*i*), or may be limited in point of time, as during the minority of the person appointed executor (*k*), or may be conferred upon condition (*l*).

Real representative.

The expression "real representative" is now commonly used to denote a person entrusted by law with the administration of the real estate of a deceased person (*m*).

Previously to the passing of the Land Transfer Act, 1897 (*n*), there was no person answering to this description of real representative. In the absence of any testamentary disposition, real estate descended upon the heir-at-law. But the heir-at-law was not a real representative in the ordinary sense of the expression. It was no part of his duty to administer the estate descending upon him. On the contrary, until action for debt or suit in equity for the administration of the real estate was brought against him, he might deal with it as he pleased without regard to the claims of creditors. Moreover, the heir-at-law did not represent the person of the deceased owner with respect to the real estate devolving upon him, in the same way as an executor or administrator represents the person of the testator or intestate as respects personal estate (*o*).

Establishment of—by Land Transfer Act, 1897.

By virtue of Part I. of the Land Transfer Act, 1897, however, there is now established in the persons or person of the personal representatives or representative

(*h*) Roll. Abr. tit. Exor. (D.), pl. 1, p. 908. See *In the Goods of Powell*, 3 Hag. Ec. Rep. 195; *Crosley* v. *Archdeacon of Sudbury*, *ib.*, 197; *In the Goods of Ratcliffe*, [1899] P. 110; *In the Goods of Baldwin*, [1903] P. 61.

(*i*) Com. Dig. (5th ed.), Adm. B. 7; *In the Goods of Mann*, [1891] P. 293.

(*k*) *Post*, p. 47.

(*l*) Com. Dig. (5th ed.). Adm. B. 7.

(*m*) The expression "real representative" is used by Mr. Joshua Williams in his treatise on Seisin, pp. 97, 98.

(*n*) 60 & 61 Vict. c. 65.

(*o*) Co. Lit. 191 a, n. vi. 3; 209 a.

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from time to time of every person dying after the commencement (*p*) of the Act, a real representative as above defined—a real representative who is not a distinct person from the personal representative, but is necessarily the same, so that instead of being merely an executor or administrator, and having only the personal estate of the testator vested in him, he now has the real estate also vested in him (*q*).

Object and effect of Act.

The expression "real representative" does not occur in the body of this enactment, but the full title (*r*) of the Act is "An Act to establish a Real Representative, and to amend the Land Transfer Act, 1875"; the preamble recites that "it is expedient to establish a real representative"; and at the commencement of Part I. of the Act appears a head-note in the words "Establishment of a Real Representative." Thus, to adopt an expression from the judgment of KEKEWICH, J., in *Re Somerville and Turner's Contract* (*s*), it is apparent that the object of Part I. of the Act was "*ex facie*" to establish a real representative. The following observations explanatory of the object and effect of the enactment are taken from the same judgment: "It was deemed inconvenient that freehold estates in land should vest in the heir, whereas leasehold estates in land vested in the personal representative, and it had been for a long time deemed desirable that the two should be placed entirely on the same footing. Accordingly the first section of the Land Transfer Act, 1897, provides by sub-s. (1) that 'where real estate is vested in any person without a right in any other person to take by survivorship'—that is, in any person for his

(*p*) The Act came into operation on January 1st, 1898 (60 & 61 Vict. c. 65, s. 25).

(*q*) *Per* KEKEWICH, J., in *Re Vickerstaff*, *Vickerstaff* v. *Chadwick*, [1906] 1 Ch. 762, at p. 766.

(*r*) See, as to the importance of titles generally, *per* LINDLEY, M.R., in *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1.

(*s*) [1903] 2 Ch. 583, 587.

sole benefit—'it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.' There is no new real representative established, though the Act is for establishing a real representative, but the personal representatives are constituted real representatives, and the Act clearly expresses the intention that the real estate is to follow, for the purpose of vesting in the representative, the law respecting chattels real, in other words, the law respecting leaseholds."

"The true object of the Act," observes BYRNE, J., in *Re Cohen's Executors and London County Council* (*t*), "is to appoint those persons already having or entitled to have control over personal estate, to have and be entitled to have control over the real estate." In all cases to which the Act applies, therefore, the personal representatives or representative for the time being are the persons entrusted by law (within the definition of real representative above given (*u*)) with the administration of the real estate of a deceased person; and, in their character as such, will take the real estate by virtue of the Act, as well as the personal estate (if any) as heretofore, by the general law, notwithstanding any disposition or direction to the contrary contained in the will.

Appointment of "real representative" or special executor of real estate ineffectual.

It seems to follow as a necessary corollary from the above propositions that a testator cannot by any device or disposition control the devolution of real estate to which he is entitled and to which the Act applies, except so far as his choice of executors or of an executor of personal estate, which remains unfettered by the Act, enables him to do so. He cannot,

(*t*) [1902] 1 Ch. 187, at p. 190.

(*u*) *Ante*, p. 7.

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apparently, by his will, effectually appoint a real representative as such. The Act makes the appointment for him. Suppose, for example, a testator were to make an appointment in either of the following forms: "I appoint A. and B. executors of this my will and C. my real representative," or "I appoint C. executor of this my will as to all my real estate and I appoint A. and B. general executors of this my will." In neither case would C. be an executor of the will or a personal representative of the testator. In the latter case, it is true C. is especially designated "executor"; but this is insufficient to constitute him executor where, as in the case supposed, the administration of the whole of the personal estate is given away from him (*x*). In both cases, accordingly, the appointment of C. must be held to be nugatory, as being a testamentary direction or disposition contravening the provision of the Act that real estate shall vest on death in the "personal representatives," *i.e.*, the executors, and purporting to vest it in somebody else.

"Personal representatives or representative from time to time"—Special executors.

Although every real representative must also be personal representative, which expression, it has already been said, is defined in the Act of 1897, as meaning "an executor or administrator" (*y*), the converse of the proposition, namely, that every personal representative is also real representative is not universally true. The declaratory words contained in s. 1 (1) of Part I. of the Act relative to the vesting of real estate within the meaning of the Act of a person dying on or after January 1st, 1898, are that such real estate "shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or

(*x*) See Godolph. (3rd ed.), p. 83.
(*y*) 60 & 6 Vict. c. 65, s. 24 (2).

him." In *Re Cohen's Executors and London County Council* (*z*), BYRNE, J. construed the concluding words of the sub-section to mean "those persons in whom as personal representatives or representative chattels real (if the testator has any) vest." In that case the testator had appointed certain persons to be special executors of his will as to property situate in Australia and other persons as general executors of his will. On sale of the testator's real estate in England, it was objected on behalf of the purchaser that having regard to the prohibition contained in s. 2 (2) of the Act, a good title could not be made without the concurrence of the colonial executors. The objection was, however, over-ruled, on the ground that no chattels real vested in the colonial executors jointly with the English executors and that it would be going against the true meaning of s. 1 (1) to hold that "real estate" was to vest in persons not entitled to probate in England and not entitled to chattels real. The same reasoning appears to exclude from the office of real representative special executors appointed in respect of particular assets in England other than chattels real.

Save for this exception, it may safely be asserted that the expression "personal representatives or representative from time to time" includes all persons named by the testator as executors of his will and in whom the representation to the testator for the time being continues in accordance with well settled rules governing the devolution of the office of executor (*a*). As will be shown later (*b*) an executor who has not proved the will, but to whom liberty to come in and prove has been reserved, continues a personal representative of the testator until he renounces or dies or is cleared off by citation and non-appearance.

(*z*) [1902] 1 Ch. 187.
(*a*) See *post*, pp. 14, 25, 26.
(*b*) See *post*, p. 27.

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Such an executor, it has been held, until the happening of any such event, is constituted, by the Act, real representative of the testator jointly with the proving executors (*c*).

–Special administrators.

The expression "personal representatives or representative from time to time" must also include any persons or person to whom administration has been granted in general terms so as to extend, by virtue of the Land Transfer Act, 1897, to real estate, for the effect of the Act has been to give to the Probate Division of the High Court jurisdiction over real estate which was not previously exerciseable (*d*). The Court, indeed, is expressly empowered to grant probate and letters of administration in respect of real estate only, although there is no personal estate; but the meaning of this provision appears to be merely that a grant in general terms, extending by virtue of the Act to real estate may be made, notwithstanding evidence that there is no personal estate in respect of which the grant can operate (*e*). It may be doubted whether the Court has any jurisdiction by virtue of the Act to make separate grants of administration in respect of real and personal estate respectively, that is to say, to grant separate administrations as to the personalty to one person, and as to the realty to another person. In a case (*f*) where a married woman left both real and personal estate, and administration to both was claimed by her husband and by the guardian *ad litem* of her infant heir-at-law, administration of all her estate was, under the circumstances, granted to the latter, notwithstanding that if there had been only personalty the

(*c*) *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58.

(*d*) *Re Shaw, Bridges* v. *Shaw*, [1894] 3 Ch. 615; *Re Vickerstaff, Vickerstaff* v. *Chadwick*, [1906] 1 Ch. 762.

(*e*) See *In the Goods of Barnett*, [1898] P. 145.

(*f*) *In the Goods of Ardern*, [1898] P. 147.

husband's right to administer would have been beyond dispute.

On the other hand, the power of the Court to grant limited administrations is not affected by the Act, and, it is conceived that a grant limited to certain specific effects (*g*) has by virtue of the Act, no more extended operation than formerly (*h*).

Joint executorships.

Where several persons are constituted joint personal representatives of one estate, they all make but one representative, being distinct rather in their persons than in their office (*i*). The interest of each of several executors in the personal estate of his testator is not precisely the same as that of each of several joint tenants in property to which they are beneficially entitled, but is a joint and entire interest in the property held by them as executors (*j*). One of several joint executors can accordingly make a good title to any part of the personal estate of the testator without the concurrence of the remaining executors (*k*).

Joint administrations.

It was at one time thought that the position of one of several joint administrators was different in this respect to that of one of several joint executors (*l*), but the better opinion at the present time appears to be that executors and administrators stand upon precisely the same footing as to the nature of the estate vested

(*g*) See *ante*, p. 6.

(*h*) See Tristram and Coote (14th ed.), pp. 122 *et seq.*

(*i*) Godolph. (3rd ed.), p. 423; Wentw. Off. Ex. (14th ed.), pp. 213, 474.

(*j*) Com. Dig. (5th ed.), tit. Administration, B. 12; Toller (7th ed.), p. 242; *Jacomb* v. *Harwood*, 2 Ves. 267.

(*k*) Dyer, 23 b; *Simpson* v. *Gutteridge*, 1 Madd. 609, 617. See *Sneesby* v. *Thorne*, 1 Jur. (N.S.) 1058; *Re Ingham, Jones* v. *Ingham*, [1893] 1 Ch. 352.

(*l*) *Hudson* v. *Hudson*, 1 Atk. 460.

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in them, and as to their power of dealing individually with the assets to be administered by them (*m*).

Effect of Land Transfer Act upon joint representations.

The provision contained in s. 2 (2) of the Land Transfer Act, 1897 (*n*), that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate, appears to render the interest of several personal representatives in the real estate devolving upon them by virtue of that Act, similar in all respects to that of ordinary joint tenants.

Devolution of joint representations.

Inasmuch as the law regards several joint personal representatives as forming one person, upon the death of one of them, the office with its incidents, duties, and powers, and the interest in all property vested in them by virtue of their office, devolves upon the survivors or survivor of them (*o*).

Devolution of sole representation.

But the course of devolution of the office of real and personal representative upon the death of a sole representative or the survivor of several representatives will depend upon the manner of its inception.

Sole executor.

The power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence (*p*). But an administrator is merely the officer of the Court, as successor to the ordinary. His appointment is prescribed by Act of Parliament. In him the deceased has reposed no trust at all; and therefore

Sole administrator.

(*m*) *Willand* v. *Fenn*, cited 2 Ves. 267; *Jacomb* v. *Harwood*, 2 Ves. 267. See Petersdorff Abr. 345; Toller (7th ed.), p. 407.

(*n*) 60 & 61 Vict. c. 65.

(*o*) *Flanders* v. *Clarke*, 3 Atk. 510. See Com. Dig. (5th ed.), tit. Administration B. 12 n; *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 121.

(*p*) See Wentw. Off. Ex. (14th ed.), pp. 462, 463.

upon his death it results back to the Court to appoint another to officiate *de bonis non* (*q*).

Sole executor dying before probate.

For the purpose of transmitting representation, an executor is not considered as representing his testator unless he (*r*) or his attorney for him (*s*) has proved the will. Nor does a limited executor represent his testator for this purpose (*t*).

Office of personal representative is not assignable.

Neither the office of executor nor that of administrator is assignable (*u*).

(*q*) See 2 Bla. Com. (10th ed.), p. 506; Shep. Touch. (ed. Preston), p. 465; Tristram and Coote's Probate Practice (14th ed.), pp. 137 *et seq.* See *In the Goods of Gaynor*, L. R. 1 P. & D. 723.

(*r*) *Wankford* v. *Wankford*, 1 Salk. 308.

(*s*) *In the Goods of Bayard*, 1 Rob. 768; *In the Goods of Donna Maria Murguia*, 9 P. D. 236.

(*t*) *In the Goods of Bayne*, 1 Sw. & Tr. 132.

(*u*) 3 Bac. Abr. (7th ed.) 42; *Bedell* v. *Constable*, Vaugh. 177, 182.

CHAPTER II.

OF THE APPOINTMENT OF AN EXECUTOR.

SECTION I.

Who may be Appointed Executor.

Appointment of executor essential to the will.

The appointment of an executor is said to be the "head and foundation of the testament," for, if the deceased makes no such appointment, he dies intestate in law, and a grant of letters of administration to his estate will be rendered necessary (*a*).

General rule as to appointment of executors.

A testator may appoint whom he will to be his executor or executors (*b*); and the person so appointed is entitled before all others to prove the will (*c*), but probate will not be granted to persons who, though named as executors, are subject to the disabilities of infancy or lunacy.

Where the person appointed executor is resident out of the United Kingdom, the court is empowered to appoint such person as it thinks fit to be administrator, where, owing to the special circumstances of the case, such a course appears to be necessary or convenient (*d*).

Appointment of corporations sole—the King.

Corporations sole may be appointed executors (*e*). In the case of the King being appointed, "he doth

(*a*) Shep. Touch. (ed. Preston), p. 406; Wentw. Off. Ex. (14th ed.), pp. 3, 4; 2 Bla. Com. (10th ed.), p. 494.

(*b*) Swinb. (7th ed.), p. 650; Godolph. (3rd ed.). p. 75. A child *en ventre sa mère* may be an executor (*Thelluson* v. *Woodford*, 4 Ves. 322; *Villar* v. *Gilbey*, [1906] 1 Ch. 583, at p. 591 [C. A.]).

(*c*) See Tristram and Coote's Probate Practice (14th ed.), p. 16.

(*d*) 20 & 21 Vict. c. 77, s. 73. See *In the Goods of Samson*, L. R. 3 P. & D. 48.

(*e*) Wentw. Off. Ex. (14th ed.), p. 39; Godolph. (3rd ed.), p. 85. See *In the Goods of Haynes*, 3 Curt. 75.

appoint certain persons to officiate the execution of the will, against whom such as have cause of action may bring their suits, and appointeth others to take the account" (*f*).

Appointment of corporations aggregate.

Corporations aggregate, on being appointed executors, may, as they are themselves incapable of taking the executor's oath (*g*), appoint persons styled syndics, to receive administration with the will annexed, who are sworn like all other administrators (*h*); but where a corporation aggregate and one or more individuals are jointly appointed to be executors, administration will not be granted to a syndic unless all those individually appointed to be executors renounce probate (*i*). In a recent case, where a limited company were appointed executors, administration with the will annexed was granted to the general manager of the company (*k*).

Disability of infancy.

The disability of infancy is statutory. During the period of infancy, if the infant be the sole executor named in the will, administration *cum testamento annexo* must be granted to the infant's guardian or such other person as the Court thinks fit (*l*), but the infant will be admitted to prove upon coming of age.

Disability of lunacy.

The disability of lunacy depends upon the inability of the lunatic person to take the executor's oath (*m*).

Former disabilities.

There were formerly other disabilities caused by coverture, foreign nationality, and, under the canon law, the commission of certain offences against religion (*n*), to which it is necessary shortly to refer.

(*f*) Godolph. (3rd ed.), p. 76.

(*g*) Wentw. Off. Ex. (14th ed.), p. 39; Godolph. (3rd ed.), p. 85.

(*h*) Swinb. (7th ed.), p. 659; 3 Bac. Abr. (7th ed.) 5; Toller (7th ed.), p. 30.

(*i*) *In the Goods of Marten*, 90 L. T. R. 264.

(*k*) *In the Goods of Hunt*, [1896] P. 288; *cf. Re Richards, Lawson* v. *Harvey*, [1901] 2 Ch. 399.

(*l*) 38 Geo. 3, c. 87, s. 6. See *In the Goods of Stewart*, L. R. 3 P. & D. 244.

(*m*) Godolph. (3rd ed.), p. 86.

(*n*) See, as to these offences, Swinb. (7th ed.), pp. 660—679.

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Married women.

With regard to the first of these disabilities, a married woman was formerly incapable of accepting the office of executrix without the consent and concurrence of her husband (*o*). But by the Married Women's Property Act, 1882 (*p*), it is provided that a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract in all respects as if she were a *feme sole*; and by s. 24 of that Act it is enacted that:

> "The word 'contract' in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled (*q*) in the trust or administration. . . ."

The effect of including in the word "contract" the acceptance of the office of executrix or administratrix is to put married women in regard to these offices on the same footing as they stand with reference to a contract under s. 1 (2), so that by the joint operation of the two sections a married woman is now enabled to accept the office of administratrix or executrix without the consent of her husband. The latter part of the section imports the provisions as to liabilities which are provided in respect of contracts by s. 1 (2), and, subject as therein mentioned, releases the husband from liability (*r*).

(*o*) 3 Bac. Abr. (7th ed.), 9; Toller (7th ed.), p. 31. As to the position of a married woman executrix before the Married Women's Property Act, see Wentw. Off. Ex. (14th ed.), p. 651 n.

(*p*) 45 & 46 Vict. c. 75, s. 1 (2).

(*q*) As to what constitutes "intermeddling," see *post*, pp. 20 *et seq.*

(*r*) *Re Turnbull, Turnbull* v. *Nicholas*, [1900] 1 Ch. 180, 185. See further as to the contractual liabilities of a married woman, *post*, pp. 140 *et seq.*

Aliens.

Aliens might be executors provided they were not alien enemies (*s*), although until the year 1870 they were incapable of holding or acquiring other than chattel interests in land in the British possessions. This disability is removed by the Naturalization Act, 1870 (*t*), as to lands in the United Kingdom.

Bankrupts, insolvents, and persons of bad character.

Probate will not now be refused on the ground of disabilities recognised only by the canon law (*u*), or of the insolvency or bankruptcy (*x*) of the person appointed executor. Where the person appointed executor was insolvent, the Court has, in some cases, appointed a receiver to act for him (*y*); but not where the insolvency was known to the testator at the time of the appointment (*z*).

Judicial Trustees Act, 1896.

Prior to the Judicial Trustees Act, 1896 (*a*), the Court had no power to appoint a person to perform the duties of executor, corresponding to that of appointing new trustees (*b*). By s. 1 (1) of that Act, however, power is given to the Court in its discretion to appoint a person, called a judicial trustee, to be a trustee of a trust, either jointly with any other person, or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees; and by s. 1 (2) it is provided that the administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee within the meaning of the Act.

Power to restrain bankrupt executor from acting as executor.

The Court may also restrain an executor who has become bankrupt from further acting as executor (*c*).

(*s*) Wentw. Off. Ex. (14th ed.), p. 35; Godolph. (3rd ed.), p. 85.
(*t*) 33 & 34 Vict. c. 14, s. 2.
(*u*) *Rex* v. *Raynes*, 1 Salk. 299.
(*x*) *Hills* v. *Mills*, 1 Salk. 36.
(*y*) *R.* v. *Simpson*, 1 W. Bl. 458.
(*z*) *Stainton* v. *The Carron Company*, 18 Beav. 146, 161.
(*a*) 59 & 60 Vict. c. 35.
(*b*) *Re Willey*, W. N. (1890) 1 [C. A.]; *Eaton* v. *Daines*, W. N. (1894) 32.
(*c*) *Bowen* v. *Phillips*, [1897] 1 Ch. 174.

SECTION II.

OF THE ACCEPTANCE OR REFUSAL OF THE OFFICE OF EXECUTOR.

What acts amount to acceptance of office.

The Court will not hold a person responsible as executor unless he has manifested his intention of accepting the office of executor and the administrative duties incident to that office by having "either administered, that is, intermeddled with, the estate, or proved the will" (*d*); and for this purpose a will is not to be regarded as proved until probate is actually granted. Application for probate is no indication of the intention of a person named as executor to accept office (*e*).

The question as to what acts amount to administering in the sense of intermeddling has frequently arisen for the decision of the Court in cases where it has been sought to render a person liable as executor *de son tort;* and it would seem (*f*) that a person named as executor will be held to have accepted the trusts of administration if he has done any act the doing of which would constitute a person not named as executor an executor *de son tort* (*g*).

What acts constitute a person executor *de son tort.*

An executor *de son tort* is defined by Wentworth to be "such as takes upon him the office of an executor by intrusion, not being so constituted by the testator or deceased, nor for want of such constitution, substituted by the ordinary to administer" (*h*).

(*d*) *Mohamidu Mohideen Hadjiar* v. *Pitchey*, [1894] A. C. 437. See Bac. Abr. (7th ed.), tit. Exor. (E), *p.* 469.

(*e*) See Bac. Abr. (7th ed.), tit. Exor. (E.), p. 443.

(*f*) In Wentw. Off. Ex. (14th ed.), p. 94, it is said, "But some difference may be between acts done by one named executor and by a stranger"; what the difference may be does not, however, appear.

(*g*) Bac. Abr. (7th ed.), tit. Exor. (E.), p. 469; *Long* v. *Symes*, 3 Hag. Ec. Rep. 771, 774; *Rayner* v. *Green*, 2 Curt. 248.

(*h*) Wentw. Off. Ex. (14th ed.), p. 320. An executor *de son tort* is said to have all the liabilities but none of the privileges of a rightful executor (*Carmichael* v. *Carmichael*, 2 Ph. 101). An action may be maintained against him as executor by creditors of the deceased in respect

The usurpation of even the least degree of control over the property of the deceased by a person unauthorised to exercise such control has been held to constitute such person an executor *de son tort* (*i*).

Numerous instances in which a person has so been held liable are cited by the old writers (*k*); included among these will be found so slight an act of interference as the widow of the deceased milking his cows (*l*).

Generally, it is sufficient to constitute an unauthorised person executor *de son tort* that he "take the goods of the deceased into his own possession; give and sell them; pay the debts of the deceased there-

of property of which he has taken possession, and he may be sued either separately or jointly with the rightful executor (*Re Lovett, Ambler* v. *Lindsay*, 3 Ch. D. 198, and cases there cited). An executor *de son tort*, indeed, is not an executor in the full sense—he does not sufficiently represent the deceased's estate, so as to enable the Court to make an administration decree in the absence of a duly constituted representative (*Rowsell* v. *Morris*, L. R. 17 Eq. 20)—nor is he a mere trespasser. The position of an executor *de son tort* and the reason why he is not treated merely as a trespasser is explained in *Read's Case*, 5 Rep. 33 b, as follows: "Where a man dies intestate, and a stranger takes the intestate's goods and uses them or sells them, in that case it makes him executor of his own wrong. For although the pleading in such case be that he was never executor, nor ever administered as executor, and, therefore, it was objected that he ought to pay debt or legacy or do something as executor, yet it was resolved and well agreed that when no one takes upon him to be executor, nor any hath taken letters of administration, there the using of the goods of the deceased by anyone or the taking of them into his possession, which is the office of an executor or administrator, is a good administration to charge them as executors of their wrong, for those to whom the deceased was indebted in such case have not any other against whom they can have an action for recovery of their debt." See, further, as to the relation of an executor *de son tort* to the estate of the deceased (*Doyle* v. *Foley*, [1903] 2 I. R. 95). A stranger taking possession of the property of a deceased person will not, generally speaking, be held to be executor *de son tort* where there is a rightful executor to whom probate has been granted or an administrator, for in such case the executor or administrator may sue him as a trespasser; but it is otherwise if, after taking such possession, he claims to be executor, pays or receives debts, or pays legacies, or otherwise intermeddles in that character, for, in all these cases, he becomes an executor of his own wrong (Swinb. (7th ed.), p. 871, citing 3 Bac. Abr. 22; 5 Co. 33 b; Salk. 313, pl. 19: 11 Vin. Abr. 212.

(*i*) *Edwards* v. *Harben*, 2 T. R. 597.

(*k*) See acts enumerated in Godolph. (3rd ed.), pp. 91 *et seq.*; Swinb. (7th ed.), pp. 869 *et seq.* See also 43 Eliz. c. 8.

(*l*) *Gerrett* v. *Carpenter*, Dy. 166 b n.

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with; release the debts due to the deceased; and the like" (*m*); and *à fortiori*, any similar dealing with the property by a person named executor in the will, will amount to an acceptance of the executorship and fix him with the responsibilities of office (*n*).

What acts will not constitute a person executor *de son tort.*

There are, however, certain acts of necessity which may be done by a person who is not named executor, without incurring the liabilities of an executor *de son tort.* "Every having and possessing of the goods of the deceased will not make a man executor of his own wrong" (*o*); and a man who is on the spot at the time of the death may lock up the goods of the deceased for preservation until a duly constituted personal representative arrive to take possession of them, or he may make an inventory of them for the use of such personal representative (*p*).

"Neither will every disposition of the goods of the deceased make a man executor of his own wrong" (*q*). So if the necessity arises a person may give directions for the funeral (*r*), and even pay for it out of any available ready money of the deceased (*s*), without incurring any such liability; and with the like immunity, he may order necessaries for the household, provide for the deceased's horses and cattle, pay the physician's fees, and perform other like acts of charity (*t*).

(*m*) Shep. Touch. (ed. Preston), p. 487; Godolph. (3rd ed.), p. 90, 92, 101. See *Hooper* v. *Summersett*, Wightw. 16.

(*n*) Roll. Abr. 917; 11 Vin. Abr. 206; Wentw. Off. Ex. (14th ed.), pp. 93, 94; *Long* v. *Symes*, 3 Hag. Ec. Rep. 771, 775.

(*o*) Shep. Touch. (ed. Preston), p. 488. See *Hill* v. *Curtis*, L. R. 1 Eq. 90.

(*p*) *Ibid.;* Godolph. (3rd ed.), pp. 93, 94.

(*q*) Shep. Touch. (ed. Preston), p. 489; *Peters* v. *Leeder*, 47 L. J. Q. B. 573.

(*r*) *Harrison* v. *Rowley*, 4 Ves. 212, 216.

(*s*) Godolph. (3rd ed.), p. 101; *Camden* v. *Fletcher*, 4 M. & W. 378.

(*t*) Godolph. (3rd ed.), p. 101.

What acts will not amount to acceptance of office of executor.

Similarly, a person named as executor does not necessarily show an intention to accept the trust of administration by the performance of some act of charity (*u*) or necessity (*v*); but the circumstances of the case will be taken into consideration by the court in deciding whether or not an act of administration evidences an intention to accept the office of executor (*y*).

If it is shown that the acts relied upon as constituting an acceptance of the executorship by one of two executors who has not proved, were done by him as the agent of the other executor who has proved, the person so acting as agent cannot be made liable as executor (*z*).

Acceptance cannot be partial.

A person appointed executor must accept or refuse the office *in toto;* he cannot accept one part of the duties of an executor and refuse the rest (*a*). So an executor of an executor who has accepted the executorship of the latter testator, cannot renounce the executorship of the former (*b*).

Effect of acceptance.

If the person appointed executor accepts the office, he accepts also the duties of the office and becomes a trustee in the sense that he will be personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office (*c*).

Liability of executor to action before probate

A person appointed to be executor may be sued before probate if he has intermeddled with the estate, that is

(*u*) Shep. Touch. (ed. Preston), p. 466.

(*x*) *Long* v. *Symes*, 3 Hag. Ec. Rep. 771; Wentw. Off. Ex. (14th ed.), p. 94.

(*y*) *Rayner* v. *Green*, 2 Curt, p. 248; *In the Goods of Coates*, 78 L. T. 820.

(*z*) *Orr* v. *Newton*, 2 Cox, 274; *Re Stevens, Cooke* v. *Stevens*, [1897] 1 Ch. 422, 431.

(*a*) Shep. Touch. (ed. Preston), p. 466.

(*b*) *Brooke* v. *Haymes*, L. R. 6 Eq. 25.

(*c*) *Re Marsden*, 26 Ch. D. 783.

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to say, if he has acted as executor although he may not have received anything as such (*d*), and *à fortiori* if he has received any part of the assets (*e*). An executor who has once acted in the administration in such a manner as to have accepted the executorship, must continue to administer the estate, and may be compelled to take out probate at the suit of either creditor (*f*) or beneficiary (*g*).

Penalties for acting without taking out probate.

Moreover, any person who "shall take possession of and in any manner administer" any part of the personal estate of a deceased person without obtaining probate or letters of administration within six months after the deceased's death, commits a statutory offence for which penalties are provided (*h*); and, inasmuch as the duties and liabilities of personal representatives in respect of personal estate are, by the Land Transfer Act, 1897 (*i*), made to apply to real estate so far as the same are applicable, it would appear that any person dealing with real estate within the purview of that Act before probate or grant of letters of administration will incur the same penalties unless he subsequently obtain a grant within the prescribed period (*j*).

Refusal of office.

A person appointed executor and not wishing to act, may expressly renounce the executorship, or may simply abstain from all interference in the administration.

(*d*) *Vickers* v. *Bell*, 4 De G. J. & S. 274.

(*e*) *Re Lovett*, *Ambler* v. *Lindsay*, 3 Ch. D. 198.

(*f*) *Mordaunt* v. *Clarke*, L. R. 1 P. & D. 592.

(*g*) *In the Goods of Coates*, 78 L. T. 820.

(*h*) 55 Geo. 3, c. 184, s. 37; 44 & 45 Vict. c. 12, s. 40. See *Att.-Gen* v. *New York Breweries Co.*, [1897] 1 Q. B. 738; [1898] 1 Q. B. 205 [C. A.].

(*i*) 60 & 61 Vict. c. 65, s. 2 (2).

(*j*) If this should be the case, a further difficulty arises where in order to make a good title to real estate an executor to whom liberty to prove has been reserved is required to join with the acting executors in conveying the property. See *post*, p. 187.

Express renunciation.

An express renunciation of the office may be made either personally or by proxy (*k*). But no renunciation of the office can exist as an effective instrument until it has been recorded (*l*) in the principal registry or one of the district registries of the Probate Division (*m*). A renunciation, therefore, until it is filed, is not final, and may be withdrawn (*n*).

A renunciation may be retracted for the purpose of taking a grant, but for no other purpose (*o*).

Effect of renunciation

The consequences of renunciation of the office of executor are defined by the Court of Probate Act, 1857 (*p*), to be as follows:

> "Where any person, after the commencement of this Act, renounces probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease; and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor."

It is now settled that there is nothing in the above clause to prevent the court from allowing an executor to retract his renunciation in a proper case (*q*).

Effect of refusal.

The case of a person appointed executor who does not expressly renounce but refrains from all interference in the administration, is provided for by s. 16 of the

(*k*) Toller (7th ed.), p. 42. See Wentw. Off. Ex. (14th ed.), p. 88.

(*l*) *Long* v. *Symes*, 3 Hag. Ec. Rep. 771; *In the goods of Robert Morant*, L. R. 3 P. & D. 151.

(*m*) See 20 & 21 Vict. c. 77, ss. 4, 13; 36 & 37 Vict. c. 66, ss. 3, 31.

(*n*) *In the Goods of Robert Morant*, *supra*.

(*o*) *In the Goods of Whitham*, 1 P. & D. 303.

(*p*) 20 & 21 Vict. c. 77, s. 79.

(*q*) *In the Goods of Whitham*, *supra*; *In the Goods of Stiles*, [1898] P. 12.

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Court of Probate Act, 1858 (*r*), whereby it is enacted that:

> "Whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease; and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor."

Result where one of several executors renounces or refuses.

The effect of the above sections upon the appointment of executors contained in the will, is that upon one or more of the persons, named as executors in the will, ceasing to represent the testator in any of the ways mentioned in those sections, the appointment of such persons is rendered absolutely nugatory, and the executors' right of control over the property of the testator, and the legal interest therein, which, by virtue of the appointment, originally vested in all the executors, pass to the continuing executor or executors if any (*s*).

Accordingly, where an executor died having neither renounced nor taken out probate, it was held that the executor of the survivor of two acting co-executors became the personal representative of the original testator (*t*).

And in a case in which probate had been granted to one of two executors, and power reserved to the other, upon the death of the former, the latter not having appeared to a citation, it was held that the executor of the deceased acting executor was the proper representative of the original testator (*u*).

(*r*) 21 & 22 Vict. c. 95, s. 16.

(*s*) See *Crawford* v. *Forshaw*, [1891] 2 Ch. 261 [C. A.]

(*t*) *In the Goods of Charles Lorimer*, 2 Sw. & Tr. 471.

(*u*) *In the Goods of Robert Noddings*, 2 Sw. & Tr. 15; *In the Goods of Reid*, [1896] P. 129.

Result where sole executor renounces or refuses.

When a person appointed sole executor dies before probate, or renounces probate of the will, or fails to appear when cited, the right to commit representation to the deceased devolves upon the President of the Probate Division, in whom also, it would appear, the legal interest in the property will remain vested in the interim (*x*).

Representation will not, however, be committed afresh upon the mere consent of an executor who appears. He must either renounce probate or withdraw his appearance (*y*).

Effect of liberty to prove being reserved

It is to be observed that in neither of the sections is any reference made to the case of an executor to whom power to prove is reserved. It has accordingly been held that in such case the representation to the testator will continue in the executor to whom such power is reserved jointly with the acting executors until the former renounces or dies, or is cleared off by citation and non-appearance (*z*); and, agreeably to that decision, that an executor to whom liberty to prove has been reserved is a personal representative within the meaning of the Land Transfer Act, 1897 (*a*).

SECTION III.

OF THE EFFECT OF THE APPOINTMENT OF AN EXECUTOR.

Will operates immediately upon testator's death.

So long as the testator lives his will is ambulatory, and is therefore of no force or validity until he dies (*b*). Upon his death the will itself becomes an authority to

(*x*) See *post*, p. 36.

(*y*) *Garrard* v. *Garrard*, L. R. 2 P. & D. 238. See *Long* v. *Symes*, 3 Hag. Ec. Rep. 771.

(*z*) *In the Goods of Reid*, [1896] P. 129.

(*a*) 60 & 61 Vict. c. 65, s. 1. See *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58. And see *post*, p. 187.

(*b*) Godolph. (3rd ed.), p. 4. See 1 Vict. c. 26, s. 24.

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the person appointed executor, to exercise control over the assets of the testator committed to his charge (*c*), and to deal with them in due course of administration (*d*). According to Wentworth (*e*), the payment of the debts of the deceased is the main and principal part of an executor's office; and the naming of persons to be executors "is by implication a gift or donation unto them of all the goods and chattels, credits and personal estate of the testator, and the laying upon them an obligation to pay all his debts, and making them subject to every man's action for the same." In addition to the goods and chattels and personal estate of the testator, certain trust and mortgage estates (*f*), and, since the establishment by the Land Transfer Act, 1897 (*g*), of a real representative (*h*), real estate within the meaning of that Act will now vest in the person appointed executor from the moment of the testator's death. The law knows no interval between the testator's death and the vesting of the right in his representative (*i*).

Effect of probate.

Inasmuch as the executor derives his authority over, and interest in, the testator's estate from the will itself, it follows that he can derive no further or greater authority or interest from the grant of pro-

(*c*) Where in addition to the appointment of general executors of the will, there is also contained in the will an appointment of some other person to be special executor in respect of some specific asset or part of the testator's property, the authority of the general executors extends to the particular property in respect of which the special executor is appointed, so that as to that property the legal personal representatives of the testator are the general and special executors together, but as to the rest of the property the general executors are the sole representatives (*Lynch* v. *Bellew*, 3 Phillim. 424). See *Re Parker's Trusts*, [1894] 1 Ch. 707.

(*d*) *Graysbrook* v. *Fox*, Plowd. 280; *Wankford* v. *Wankford*, 1 Salk. 299.

(*e*) Wentw. Off. Ex. (14th ed.), p. 10; *Smith* v. *Milles*, 1 T. R. 475; 480; *Woolley* v. *Clark*, 5 B. & A. 744.

(*f*) See *post*, pp. 65 *et seq.*

(*g*) 60 & 61 Vict. c. 65, s. 1.

(*h*) See *ante*, pp. 7 *et seq.*

(*i*) *Whitehead* v. *Taylor*, 10 A. & E. 210, 212.

bate (*k*) subsequently made to him. The grant of probate is, in fact, an *imprimatur* merely of the authority conferred upon the executor by the will (*l*). It constitutes, nevertheless, a document of title without which, generally speaking, it will be impossible for an executor to deal with the assets of the testator for the purposes of administration other than such as pass by delivery. It is a rule of law that when either an executor has to justify what he has done as executor, or another has to justify what he has done at the request of an executor, each must prove that the executor was in fact the executor of the deceased, and this can only be done by production of probate (*m*). When the will is proved the Court has the legal optics through which to look at it (*n*).

Acts which an executor may do before probate.

There are few acts, or none, which an executor *may* not do in a due course of administration before probate (*o*), and any act so done will not be invalidated in the event of the executor dying without having obtained probate (*p*).

Power to give receipts.

Thus an executor may, before probate, receive or release debts which are owing to the estate (*q*); but, few creditors would be willing, and none could be compelled to accept the receipt of the person thus acting as executor without first being satisfied by production of the probate that he was executor in fact.

(*k*) For the practice as to grants of probate see Tristram and Coote's Probate Practice (14th ed.), pp. 12 *et seq.*

(*l*) *Smith* v. *Milles*, *supra*; *Wankford* v. *Wankford*, *supra*; *Re Barber*, *Burgess* v. *Vinnicome*, 34 Ch. D. 77, 83.

(*m*) *Att.-Gen.* v. *New York Breweries Co.*, [1898] 1 Q. B. 205, 216 [C.A.].

(*n*) *Johnson* v. *Warwick*, 17 C. B. 516, 522.

(*o*) Wentw. Off. Ex. (14th ed.), pp. 81—87; Godolph. (3rd ed.), p. 144; Toller (7th ed.), p. 45.

(*p*) Wentw. Off. Ex. (14th ed.), p. 82; *Brazier* v. *Hudson*, 8 Sim. 67.

(*q*) Wentw. Off. Ex. (14th ed.), p. 81.

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Power to sell —Leaseholds.

An executor may enter upon (*r*) and sell leaseholds before probate (*s*), but a purchaser cannot be forced to pay the purchase money and complete the purchase until probate of the will is produced (*t*).

—Real estate.

By virtue of s. 2 (2) of the Land Transfer Act, 1897 (*u*), executors have now the same power of dealing before probate with real estate to which that Act applies (*x*) as they formerly had of dealing with chattels real before probate, subject only to the saving clause at the end of the section which enacts as follows:

> "All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration . . . shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate."

Shares.

Again, an executor may no doubt deal in favour of strangers and before probate with the shares in any company of which the deceased was owner, but it is not the practice of any company to register either an executor or his transferee as owner of shares in place of a deceased shareholder until after production to them of probate of the will.

Power to bring actions.

An executor may release an action before probate (*y*). He may also, before probate, bring an action in his representative capacity (*z*), for he is executor before

(*r*) 11 Vin. Abr. 203. (*s*) Wentw. Off. Ex. (14th ed.), p. 82.

(*t*) *Newton* v. *Metropolitan Rail. Co.*, 1 Drew. & Sm. 583.

(*u*) 60 & 61 Vict. c. 65.

(*x*) See *post*, pp. 71 *et seq.*

(*y*) Godolph. (3rd ed.), p. 145; *Smith* v. *Milles*, 1 T.R. 475, 480; *Wankford* v. *Wankford*, 1 Salk. 300.

(*z*) *Wankford* v. *Wankford*, *supra*; *Humphreys* v. *Humphreys*, 3 P. Wms. 350; *Easton* v. *Carter*, 5 Exch. 8, 14; *Newton* v. *Metropolitan Rail. Co.*, 1 Drew. & Sm. 583; *Re Masonic and General Life Assurance Co.*, 32 Ch. D. 373.

probate (*a*), and his right of action is the same before probate as afterwards (*b*); but except where it is founded on his actual possession as executor (*c*) cannot maintain an action unless and until he obtains grant of probate (*d*). The precise position of an executor prior to the passing of the Common Law Procedure Act (*e*), was that he might bring his action provided he produced the probate at the proper time when the law required him to do so, viz., when he declared and made *profert* and the defendant craved *oyer* of it (*f*). Under the present practice an executor may bring his action subject to all proceedings therein being stayed, upon summons taken out by the defendant, until probate is produced (*g*).

It therefore appears that during the period preceding the grant of probate to the person named as executor, the want of any admissible evidence as to the validity of his appointment constitutes a very practical restriction upon the exercise by him of his powers *quâ* executor.

Probate is conclusive evidence of title of executor.

The probate is the only evidence of a will (*h*), and a grant of probate until revoked is conclusive evidence of the title of the person to whom the grant is made to be executor (*i*). As soon as the executor obtains probate his right is considered as accruing from the moment of the testator's death (*k*).

(*a*) Roll. Abr., tit. Exor. (A.), p. 917.

(*b*) *Smith* v. *Milles*, *supra*.

(*c*) Wentw. Off. Ex. (14th ed.), pp. 84, 85; *Oughton* v. *Seppings*, 1 B. & A. 241.

(*d*) *Wankford* v. *Wankford*, *supra*; *Re Stevens*, *Cooke* v. *Stevens*, [1897] 1 Ch. 422, 430.

(*e*) 15 & 16 Vict. c. 76.

(*f*) *Easton* v. *Carter*, 5 Exch. 8, 14.

(*g*) *Webb* v. *Adkins*, 14 C. B. 401; *Tarn* v. *Commercial Bank of Sydney*, 12 Q. B. D. 294.

(*h*) *Pinney* v. *Hunt*, 6 Ch. D. 98.

(*i*) *Concha* v. *Concha*, 11 A. C. 541, 552, 562.

(*k*) *Whitehead* v. *Taylor*, 10 A. & E. 210; *Ingle* v. *Richards*, 28 Beav. 366; *Chan Kit San* v. *Ho Fung Hang*, [1902] A. C. 257, 260.

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The Court of Probate Act, 1857 (*l*), confirms the validity of payments made and acts done under a grant of probate subsequently revoked (*m*).

Appointment of debtor to be executor.

The effect of the appointment of a debtor to be executor is to destroy the right of action at law against him in respect of his debt (*n*). And although in equity the appointment of a debtor as executor is clearly not sufficient of itself to annul the debt, there may be some equity added to the appointment that is sufficient (*o*) as, for instance, the expressed intention of the testator to forgive the debt in his lifetime (*p*). In the absence of any evidence from which any such equity may be inferred, the executor, as debtor, is held in equity to have paid himself as executor, and therefore as executor to have in his possession the full amount of the debt as having been paid to him as executor (*q*).

Appointment of creditor to be executor.

The appointment of a creditor to be executor gives rise to the executor's right of retainer hereafter discussed (*r*).

(*l*) 20 & 21 Vict. c. 77, ss. 77, 78.

(*m*) As to the practice of the Court as regards revocation of probate and the granting of fresh probate, see Tristram & Coote's Probate Practice (14th ed.), pp. 176 *et seq.* See *In the Estate of Shaw*, [1905] P. 92.

(*n*) Wentw. Off. Ex. (14th ed.) p. 73; *Carey* v. *Goodinge*, 3 Bro. C. C. 110; *Strong* v. *Bird*, L. R. 18 Eq. 315.

(*o*) *Re Hyslop, Hyslop* v. *Chamberlain*, [1894] 3 Ch. 522.

(*p*) *Strong* v. *Bird, supra; Re Applebee, Leveson* v. *Beales*, [1891] 3 Ch. 422. And see *Re Price, Price* v. *Price*, 11 Ch. D. 163 [C. A.].

(*q*) *Re Bourne, Davey* v. *Bourne*, [1906] 1 Ch. 697, 708 [C. A.].

(*r*) See *post*, pp. 105, 236 *et seq.*

CHAPTER III.

OF THE APPOINTMENT OF AN ADMINISTRATOR.

SECTION I.

Of the Jurisdiction to grant Letters of Administration, and of the Interim Vesting of the Deceased's Property.

Letters of administration are an authority issuing from the Court, deputing some person to administer all or part of the estate of a person dying intestate or quasi-intestate (*a*). Letters of administration.

A grant of letters of administration in general form "of all the estate which by law devolves to and vests in the personal representative of the deceased" will be made where the deceased owner has died wholly intestate or has made a will disposing only of personalty abroad or real estate which does not by law devolve upon the personal representative (*b*). In general form.

Where, as in some cases of quasi-intestacy, "the circumstances are such as not to warrant the Court in making a permanent grant, or where the title of the applicant itself, though general, is not absolute or unqualified," a grant will be made limited in point of duration, but otherwise general and unfettered (*c*). In other cases, "where the applicant's interest is of so limited a nature as to give no title to the administration of the deceased's estate beyond a particular portion," a grant will be made limited to that portion (*c*). Limited.

(*a*) *Ante*, p. 4.
(*b*) See Tristram and Coote's Probate Practice (14th ed.), p. 63.
(*c*) *Ibid.*, p. 92.

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Origin of jurisdiction to grant administration.

The origin of the jurisdiction to grant letters of administration in respect of personal property may be shortly summarised as follows: The property in the goods and chattels of a deceased intestate, and the right to administer them, were, anciently, by prerogative, vested in the King as trustee of the kingdom (*d*). This branch of the King's prerogative subsequently became vested in the prelates, and through them, in the ordinary of the diocese. Prior to the Statute of Westminster II., the common law was that if a man died intestate, the ordinary should have his goods to dispose of *in pios usus* (*e*).

Stat. West. II.

By that statute (*f*) it was enacted, in affirmance of the common law, that upon the death of any person intestate, the ordinary should be bound to answer the intestate's debts out of the goods coming to him. This provision was construed to extend to the case of quasi-intestacy as well as to intestacy in deed (*g*).

Stat. 31 Ed. 3.

The trust of administration reposed in the ordinary was thus, at common law, a trust to administer, in person, the estate of persons dying intestate or quasi-intestate. This trust was abused to such an extent as to lead to the early interference of the legislature, and, in the reign of Edward III., a statute was passed compelling the ordinary, in cases of intestacy, to depute the nearest and most lawful friends of the deceased to administer his goods (*h*). In this statute the word "intestate" has been interpreted as applying generally to all cases of intestacy and quasi-intestacy (*i*).

Origin of jurisdiction to grant.

The practice of making limited grants of administration may also be said to owe its origin to the statute in

(*d*) 2 Bla. Com. (10th ed.), p. 494; Bac. Abr. (7th ed.), tit. Exor. (E.), p. 459.

(*e*) *Graysbrook* v. *Fox*, Plowd. 277; Bac. Abr. (7th ed.), tit. Exor. (E.), p. 494.

(*f*) 13 Edw. 1, c. 19.

(*g*) 2 Inst. 397.

(*h*) 31 Edw. 3, c. xi.

(*i*) *Graysbrook* v. *Fox*, Plowd. 279.

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Limited administration.

question, for although such grants are not expressly provided for, it is, nevertheless, within the extent of the statute that "whenever there is a mesne time in which the executors cannot or will not execute the testament, the ordinary may in the meantime commit administration" (*k*).

Interim vesting of goods and chattels in the ordinary

The property in the deceased's goods and chattels, including leaseholds and terms of years (*l*), continued to vest in the ordinary in the interim between the death of the deceased intestate, or his becoming quasi-intestate, and the grant of letters of administration made pursuant to the statute; for by the common law the property in goods and chattels could not be in suspense (*m*).

Jurisdiction of ordinary vested in judge.

Under the above statute and a statute of the reign of Henry VIII. (*n*), the jurisdiction to grant letters of administration remained in the ordinary until the passing of the Court of Probate Act, 1857 (*o*), by which Act the jurisdiction of the ordinary was transferred to the judge of the Probate Court (*p*).

Interim vesting of personal estate and effects in judge.

The interim vesting of the property of the deceased under the new jurisdiction was provided for by s. 19 of the Court of Probate Act, 1858 (*q*), as follows:

> "From and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the judge of the Court of Probate for the time being, in the same manner and to the same extent as heretofore they vested in the ordinary."

(*k*) *Ibid.*

(*l*) Bac. Abr. (7th ed.), tit. Exor. (E.), p. 461; 11 Vin. Abr. p. 79; Co. Lit., p. 46; Shep. Touch. (ed. Preston), p. 400. See 2 Bla. Com. (10th ed.), p. 386.

(*m*) *Graysbrook* v. *Fox*, Plowd., p. 280; 2 Bla. Com. (10th ed.), p. 432.

(*n*) 21 Hen. 8, c. 5.

(*o*) 20 & 21 Vict. c. 77.

(*p*) Sections 4, 23.

(*q*) 21 & 22 Vict. c. 95, s. 19.

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Following the interpretation put upon the earlier statutes dealing with the same subject, it would seem that the above section must be taken to extend to cases of intestacy and quasi-intestacy alike.

Jurisdiction vested in Probate Division.

By the Supreme Court of Judicature Act, 1873 (*r*), the Court of Probate and several other Courts existing at the time of the passing of that Act, were consolidated and constituted the Supreme Court of Judicature.

By s. 16 of the same Act, the jurisdiction then vested in the Court of Probate was transferred to the High Court of Justice, and by s. 34 all causes and matters which would have been within the exclusive cognizance of the Court of Probate, were assigned to the Probate Division of the High Court of Justice.

Interim vesting of personal estate under Judicature Act, 1873.

The Act does not expressly provide for the interim vesting of the personal estate and effects of deceased intestates, which, but for the Act, would have continued to vest in the judge of the Court of Probate. The property therein cannot, however, remain in suspense until such time as an administrator is appointed, and must now vest, apparently, during the interval between the death of the intestate and the grant, in the President of the Probate Division of the High Court as successor to the "judge of the Court of Probate" referred to in the above-mentioned section of the Court of Probate Act, 1858 (*s*).

Jurisdiction to grant administration of real estate.

The jurisdiction of the Court to grant letters of administration of the real estate of deceased intestates dates only from the passing of the Land Transfer Act, 1897 (*t*). By the first section of that Act, jurisdiction is conferred upon the Court, subject to the provisions of s. 2 (4) thereof, to grant letters of administration over the real estate of deceased owners dying intestate,

(*r*) 36 & 37 Vict. c. 66.
(*s*) See Tristram and Coote's Probate Practice (14th ed.), pp. 8, 9.
(*t*) 60 & 61 Vict. c. 65.

similar to that already exercised by the Court in respect of personal estate, and notwithstanding that there is no personal estate (*u*).

Interim vesting of real estate under Land Transfer Act, 1897.

A question arises as to what becomes of the legal estate in realty in respect of which the owner dies intestate, in the interval preceding the grant.

It will be observed that the Land Transfer Act (*x*) provides merely that real estate to which the Act applies shall, on the owner's death, "devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him."

It has already been explained that upon the death of a person intestate or quasi-intestate, his personal estate including chattels real, vests probably in the President of the Probate Division of the High Court. But the President can scarcely be said to come within the description of "personal representative." That expression is defined by a later section (*y*) to mean an executor or administrator; and, although an "executor" in the widest acceptation of the term may be taken to mean any person "appointed to have the disposition and ordering of the goods and chattels of a man that is dead" (*z*), it must be remembered that the function of the President of the Probate Division is to grant administration, as latterly it was the function of the ordinary (*zz*), and not to administer.

The result appears to be that the Act contains no provision affecting the common law devolution of real estate upon intestacy before letters of administration are granted; and that, during the interval preceding the grant, the legal estate will vest as heretofore in the heir-at-law of the deceased owner (*a*).

(*u*) Section 1 (3).
(*x*) Section 1.
(*y*) Section 24 (2).
(*z*) *Ante*, p. 1.
(*zz*) *Ante*, p. 34.
(*a*) *John* v. *John*, [1898] 2 Ch. 573, 576.

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A question similar to the above arose on the construction of s. 30 of the Conveyancing and Law of Property Act, 1881 (*b*), upon the death intestate of a sole surviving trustee. PEARSON, J., after pointing out that this Act provides that the legal estate in a trustee or mortgagee shall, on his death, devolve to and become vested in his personal representatives or representative from time to time, observed as follows: "The question is, what happens when there is no personal representative? If the legal estate does not vest in the heir, where is it? On the other hand, the wording of the section seems to evince an intention to exclude the heir." But his lordship did not determine the question (*c*), and it is, moreover, to be observed that the Conveyancing and Law of Property Act, 1881, contains no definition of the expression "personal representative."

It is, however, obvious that even if the legal estate does vest in the heir as bare trustee pending the grant of letters of administration, no purchaser, mortgagee, or lessee could safely take from him either a conveyance in fee or lease for a term.

SECTION II.

OF THE PERSONS ENTITLED TO THE GRANT—LIMITED GRANTS (*d*).

Application for letters of administration.

The application for letters of administration must be made in the principal registry, or one of the district registries, of the Probate Division of the High Court

(*b*) 44 & 45 Vict. c. 41.

(*c*) *Re Pilling's Trusts*, 26 Ch. D. 432. See *Rackstraw's Trusts*, W. N. (1885), 73; 33 W. R. 559; *Re William's Trusts*, 36 Ch. D. 231.

(*d*) A detailed examination of the practice of the Court in regard to the appointment of administrators, is beyond the scope of this treatise. For an exhaustive exposition of the practice, see Tristram and Coote's Probate Practice (14th ed.), pp. 55 *et seq.*

of Justice, which exercises, as successor of the old Court of Probate (*e*), "the voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons" (*f*).

Statutory provision for grant of letters of administration to personal estate.

As already observed, the persons to whom it was provided that a grant of administration should be made, upon the occasion of the interference by the Legislature with the execution by the ordinary himself, of the trusts of administration, were the "next and most lawful friends of the dead person" (*g*). By the amending statute of 21 Hen. 8, c. 5, s. 2, it is provided that letters of administration may be granted to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the ordinary shall be thought good, and that, in case of claims made by several next-of-kin of equal degree, the ordinary is "to be at his election and liberty to accept any one or more making request."

Persons *primâ facie* entitled to grant.

These statutes are still in force, and subject to the right of the heir-at-law in competition with the next-of-kin under s. 2 (4) of the Land Transfer Act, 1897 (*h*), still confer upon the persons pointed out therein, a *primâ facie* right to a general grant of letters of administration in cases of actual intestacy. In cases of quasi-intestacy, as will be seen later, the residuary legatee or devisee has a prior right to the grant; and in cases of both actual and quasi-intestacy falling within s. 73 of the Court of Probate Act, 1857 (*i*), the court has power if it shall appear to be necessary or convenient by reason of the insolvency of the estate of the deceased, or other "special circumstances," to appoint some person to be administrator other than

(*e*) 36 & 37 Vict. c. 66, s. 34.
(*f*) 20 & 21 Vict. c. 77, s. 4.
(*g*) 31 Edw. 3, stat. 1, c. 11.
(*h*) 60 & 61 Vict. c. 65.
(*i*) 20 & 21 Vict. c. 77.

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the person who, if that Act had not been passed, would have been entitled to the grant (*k*). Upon any application for a grant of administration under the last-mentioned section, all persons entitled in priority to the applicant must, as a general rule, be cited (*l*).

Paramount claim of husband (*m*).

In the first place then it is settled beyond question that a surviving husband has a paramount and exclusive right to administer to the personal estate of his wife dying intestate, either on the ground that he is her "next and most lawful friend" within the meaning of the statute 31 Edw. 3, or by virtue of his marital rights at common law independently of statute (*n*), and this right is expressly confirmed by the statute 29 Car. 2, c. 3, which enacts that the Statute of Distributions (*o*) shall not "extend to the estates of feme-coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits and other personal estates and recover and enjoy the same as they might have done before the making of the said Act."

Under "special circumstances" the husband has been passed over in favour of the next-of-kin (*p*); and where a married woman died leaving real and personal estate, and her infant son by a former marriage was her heir-at-law, and it appeared that her surviving

(*k*) For a list of cases in which grants have been made under this section, the reader is referred to Tristram and Coote's Probate Practice (14th ed.), pp. 275 *et seq.*

(*l*) See *In the Goods of Harper*, [1899] P. 59; *In the Goods of Chapman*, [1903] P. 192.

(*m*) The same considerations do not apply where husband and wife have been divorced. In that case the husband ceases to have any interest in the wife's estate, and administration may be granted to the wife's next-of-kin without citing the husband (*In the Estate of Isabella Wallas*, [1905] P. 326).

(*n*) Toller (7th ed.), pp. 83, 84. See Wms. Ex. (9th ed.), p. 347.

(*o*) 22 & 23 Car. 2, c. 10. See *Re Lambert's Estate*, *Stanton* v. *Lambert*, 39 Ch. D. 626.

(*p*) *In the Goods of Sarah Moore*, [1891] P. 299. See also *In the Goods of Stephenson*, L. R. 1 P. & D. 287; *In the Goods of Shoosmith*, [1894] P. 23.

husband was a man of drunken habits, and was conducting an hotel, which was part of the estate, improperly, and so as to imperil the license, the Court under s. 73 of the Court of Probate Act, 1857 (*q*), and s. 2 (4) of the Land Transfer Act, 1897, granted administration of the estate to the guardian *ad litem* of the infant heir-at-law (*r*).

Grant *cæterorum* to husband.

Where, prior to the Married Women's Property Act, 1882 (*s*), a wife died having made a will and appointed executors, it was the practice of the Court to grant probate of the will to the executors named therein, limited to the property over which the testatrix had a power of disposal (*t*); and to make a grant of administration of the rest of the personal property (called a grant *cæterorum*) to the husband. This practice will still be followed in cases not falling within the Act (*u*). As a result of the powers of disposition conferred upon married women by the Married Women's Property Act, it is not now the practice in cases falling within the Act, in any way to limit the authority of the executors, and the husband in such case is no longer entitled to a grant *cæterorum* (*x*). The Act has not, however, affected the beneficial interest of the husband in the undisposed of personalty of his wife (*y*), nor his right to claim administration in case of her intestacy.

Where a wife dies possessed of real estate but no personal estate, the right of the husband as tenant by the curtesy must be borne in mind (*z*).

(*q*) 20 & 21 Vict. c. 77.
(*r*) *In the Goods of Ardern*, [1898] P. 147.
(*s*) 45 & 46 Vict. c. 75.
(*t*) *Ledgard* v. *Garland*, 1 Curt. 286.
(*u*) *In the Goods of Leman*, [1898] P. 215.
(*x*) *In the Goods of Price*, 12 P. D. 137; *Smart* v. *Tranter*, 43 Ch. D. 587 [C. A.].
(*y*) *Re Lambert's Estate, Stanton* v. *Lambert*, 39 Ch. D. 626.
(*z*) See 60 & 61 Vict. c. 65, s. 2 (4).

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Right of widow, next-of-kin, and heir-at-law to grant.

In accordance with the provisions of the statutes 31 Edw. 3 and 21 Hen. 8, and of s. 2 (4) of the Land Transfer Act, 1897, the next persons whose claims to the grant have to be considered in case of actual intestacy, are the widow and next-of-kin and heir-at-law.

Widow preferred.

Of these, the Court leaning strongly against joint administration (*a*), prefers the widow (*b*), although, under special circumstances, as where the widow is a lunatic (*c*), or had lived apart from her husband (*d*), administration will be granted to the next-of-kin or heir-at-law.

Where the husband dies without issue and the whole of his estate is of less value than £500, administration will apparently be granted to the widow without citing the next-of-kin (*e*).

As between next-of-kin and heir-at-law s. 2 (4) of the Land Transfer Act, 1897, enacts that:

> "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next-of-kin, and provision shall be made by rules of Court (*f*) for adapting the procedure and practice in the grant of letters of administration to the case of real estate."

(*a*) *Bell* v. *Timiswood*, 2 Phillim. 22; *Re Newbold*, L. R. 1 P. & D. 285.

(*b*) *Goddard* v. *Goddard*, 3 Phillim. 637, 638; *In the Goods of Cory*, 84 L. T. 270.

(*c*) *Re Williams*, 3 Hag. Ec. Rep. 217.

(*d*) *Lambell* v. *Lambell*, 3 Hag. Ec. Rep. 568; *In the Goods of Stevens*, [1898] P. 126; *In the Estate of Frost*, [1905] P. 140. Where husband and wife have been divorced, the wife ceases to have any interest in the estate of her former husband, and may be passed over without citation (*In the Goods of Nares*, 13 P. D. 35).

(*e*) *In the Goods of Green*, 84 L. T. 61.

(*f*) On November 20th, 1897, the following rule was made for the guidance of the registrars of the principal and district probate registries: "All rules, orders, and instructions, and the existing practice of the Court with respect to non-contentious business shall, so far as the circumstances of each case will allow, be applicable to grants of probate and administration made under the authority of the Land Transfer Act, 1897." See [1898] P. 151, note.

Where the heir applies for a grant of administration to real estate and his title is clear, there being no personal estate, a grant in general terms may be made to him without giving notice to the next-of-kin; but if the title of the applicant is doubtful, or the amount of the personalty is large as compared with the realty, notice should be given to the next-of-kin (*g*).

On an application for a grant of administration to real estate by any person other than the heir, it is necessary to cite the heir before a general grant can be made, but in a proper case a grant *ad colligendum* may be made till the heir can be found and cited (*h*).

Who are next-of-kin.

The method of tracing the next-of-kin for the purpose of ascertaining who is entitled to the grant as next-of-kin, is the same as that adopted by the Court for the purpose of determining the persons beneficially entitled to the property of a deceased intestate under the Statute of Distributions (*i*), and is considered later (*k*).

Where several next-of-kin.

Where several persons have an equal claim as next-of-kin, the Court will choose between them (*l*); and persons entitled in distribution to the personal estate are allowed a preference over the legal personal representatives of the next-of-kin (*m*).

Grant *cum testamento annexo.*

In cases of quasi-intestacy, where the testator has made a will without having appointed any executor, or has appointed an executor who has died either in his lifetime or after his death without proving the will, or has expressly or impliedly refused probate thereof, a

(*g*) *In the Goods of Barnett*, [1898] P. 145.

(*h*) *In the Goods of Roberts*, [1898] P. 149.

(*i*) *Lloyd* v. *Tench*, 2 Ves. 214.

(*k*) *Post*, cap. XV.

(*l*) *Bell* v. *Timiswood*, 2 Phillim. 22. As to the right of the Court to select an administrator, see Tristram and Coote's Probate Practice (14th ed.), pp. 190 *et seq.*

(*m*) Tristram and Coote's Probate Practice (14th ed.), p. 62.

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grant of letters of administration *cum testamento annexo* will be rendered necessary (*n*). The will must be proved, and the trusts and provisions thereof carried into execution, by the person appointed administrator in the same manner as if executors had been appointed (*o*). In such a case it is obvious that the persons immediately concerned in the due administration of the estate, are the legatees named in the will, and, in accordance with the general rule that letters of administration will be granted to the persons having the greatest interest in the estate (*p*), administration in such case will generally be granted to the universal (*q*) or residuary legatee or devisee in trust, and if there be none such legatee or devisee, to the beneficial universal or residuary legatee or devisee (*r*). The residuary legatee is preferred to others claiming under the will, even though there is no prospect of an ultimate residue. "He is the testator's choice, the next person in his election to the executors. The practice goes along with that preference" (*s*).

Right of residuary legatee to grant.

Where, in a recent case, the will consisted of specific bequests to a single legatee without any gift of residue, administration with the will annexed was granted to the legatee without citation of the next-of-kin, but limited to the property specifically bequeathed to her (*t*).

Right of creditor to grant.

If none of the next-of-kin nor the heir-at-law will take out administration, or, in the case of quasi-

(*n*) 20 & 21 Vict. c. 77, s. 73. See *In the Goods of M'Auliffe*, [1895] P. 290.

(*o*) 22 & 23 Car. 2, c. 10, s. 9. See 11 Vin. Abr. 69; 2 Bla. Com. (10th ed.), pp. 503, 508; *Wyman* v. *Carter*, L. R. 12 Eq. 309. See *Re Peacock's Settlement*; *Kelcey* v. *Harrison*, [1902] 1 Ch. 552.

(*p*) Wentw. Off. Ex. (14th ed.), p. 466 n; *Tucker* v. *Westgarth*, 2 Add. E. R. 352.

(*q*) *In the Goods of Pryse*, [1904] P. 301.

(*r*) *Atkinson* v. *Barnard*, 2 Phillim. 316; *Hutchinson* v. *Lambert*, 3 Add. E. R. 27. See *In the Goods of Bramley*, [1902] P. 106.

(*s*) *Atkinson* v. *Barnard*, *supra*. See *In the Estate of Lupton*, [1905] P. 321.

(*t*) *In the Goods of Baldwin*, [1903] P. 61.

intestacy, if the legatees under the will refuse, a grant may, by custom, be made to a creditor (*u*).

Power of Court to grant administration at its discretion.

Lastly, the judge "may, in defect of all these, commit administration to such discreet person as he approves of (*x*); or may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody, and to do other acts for the benefit of such as are entitled to the property of the deceased" (*y*).

Grants limited in point of duration.

It has been seen (*z*) that in certain cases the circumstances may be such as not to warrant the making of a permanent grant of administration. Such cases occur wherever an executor or other person entitled to probate or letters of administration, as the case may be, is precluded from acting personally by reason either of his residence out of the jurisdiction, or of one or other of the disabilities already mentioned (*a*). In such cases administration will be granted, limited to such period as must elapse before probate or administration in general form can be granted to the person entitled thereto. It is proposed to refer shortly to some of the more usual forms of grants of administration limited in this manner (*b*).

(*u*) *Webb* v. *Needham*, 1 Add. E. R. 494. See Bla. Com. (10th ed.), p. 505. See, further, as to grants of administration to creditors, *Coombs* v. *Coombs*, L. R. 1 P. & D. 288; *In the Goods of Brackenbury*, 2 P. D. 272; *In the Goods of Ashley*, 15 P. D. 120; Tristram and Coote's Probate Practice (14th ed.), p. 74.

(*x*) See *In the Goods of George Moore*, [1892] P. 145.

(*y*) 2 Bla. Com. (10th ed.), p. 505; Tristram and Coote's Probate Practice (14th ed.), p. 130.

(*z*) *Ante*, p. 33.

(*a*) *Ante*, p. 17.

(*b*) It is impossible within the space allotted to the discussion of limited administrations in the present treatise to give more than a general outline of the subject. All that can be attempted is to convey some idea of the various limitations which under different circumstances may be imposed by the grant on the authority of the administrator. The practice will be found fully dealt with in Tristram and Coote's Probate Practice (14th ed.), pp. 92 *et seq.*

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Grant *durante absentia.*

Where the person entitled to represent the deceased either as executor (*c*) or administrator (*d*) is resident out of England, administration or administration with the will annexed may be granted to the attorney, lawfully appointed for that purpose, of such person (*e*). The grant in that case is expressed to be made for the use and benefit of the principal and until he shall apply for and obtain probate or letters of administration as the case may be (*f*). An administrator *durante absentia* so appointed is full administrator exactly as if he had obtained administration in his own right, as regards the claims of other persons (*g*). Until duly relieved of his office by the act or the death (*h*) of his principal, he is liable to all claims by persons entitled to claim against the estate (*i*). He must distribute the assets among the persons entitled, and cannot obtain a good discharge by merely handing them over to his principal (*k*).

By the statute 38 Geo. 3, c. 87, s. 1, it was enacted that:

> "... at the expiration of twelve calendar months from the death of any testator, if the executors or executor to whom probate of the will shall have been granted are or is then residing (*l*) out of the jurisdiction of his Majesty's Courts of law and equity, it shall be lawful for the Ecclesiastical Court which hath granted probate of such will, upon the application of any creditor, next-of-kin or legatee, grounded on the affidavit hereinafter mentioned, to grant such special administration as hereinafter is also mentioned ..."

(*c*) *In the Goods of Barker*, [1891] P. 251.

(*d*) *In the Goods of Goldsborough*, 1 Sw. & Tr. 297.

(*e*) P. R. 1862, r. 32.

(*f*) *In the Goods of Cassidy*, 4 Hag. Ec. Rep. 360.

(*g*) *Chambers* v. *Bicknell*, 2 Hare, 536; *Re Dewell, Edgar* v. *Reynolds*, 4 Drew, 269, 272.

(*h*) *Webb* v. *Kirby*, 7 De G. M. & G. 376.

(*i*) *Re Dewell, supra.*

(*k*) *Re Rendell, Wood* v. *Rendell*, [1901] 1 Ch. 230.

(*l*) *In the Goods of Ruddy*, L. R. 2 P. & D. 330. See also, *ante*, p. 16.

By the Court of Probate Act, 1857 (*m*), the Court was empowered in like manner to grant letters of administration where the administrator has left the jurisdiction.

The above statutes, which were held to extend only to authorise the grant of administrations *durante absentia* when there were proceedings depending in Chancery (*n*), have since been amended so as to confer upon the Court authority to make the grant "whether it be or be not intended to institute proceedings in the Court of Chancery" (*o*).

Grant *durante minore ætate.*

In the case of an appointment by will of an infant executor, the infant's guardian, or such other person as the Court thinks fit, will be appointed administrator *durante minore ætate* (*p*). A person so appointed has the ordinary powers and duties of an administrator until the infant comes of age (*q*).

Grant for use and benefit of executor who is ill or lunatic.

Where a person appointed sole executor becomes lunatic (*r*), or too ill to be served with a citation to accept or refuse probate (*s*), letters of administration will be granted for the use and benefit of the executor until recovery. But where one of two acting executors become lunatic, a fresh probate will be granted to the sane executor (*t*).

Practice where person to whom grant is made becomes insane.

The practice as to administration where a grant has been made to one of the next-of-kin, and such next-of-kin becomes insane, has been stated by Sir FRANCIS JEUNE, to be as follows:

"First, where such a lunatic has been so found by inquisition, and there is a committee of the property,

(*m*) 20 & 21 Vict. c. 77, s. 74.

(*n*) *In re Davies*, 2 Hag. Ec. Rep. 79.

(*o*) 21 & 22 Vict. c. 95, s. 18.

(*p*) 38 Geo. 3, c. 87, s. 6.

(*q*) *Re Cope, Cope* v. *Cope*, 16 Ch. D. 49; *Re Thompson and M'Williams' Contract*, [1896] 1 I. R. 356 [C. A.].

(*r*) *In the Goods of Phillips*, 2 Add. E. R. 336 n. See *In the Goods of Southmead*, 3 Curt. 28.

(*s*) *In the Goods of Ponsonby*, [1895] P. 287.

(*t*) *In the Goods of Marshall*, 1 Curt. 297.

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the grant is made to such committee for the use of the lunatic, so long as he shall remain a lunatic. The first grant is not, in such case, impounded.

"Secondly, where the lunatic is not so found by inquisition, but, under section 116 of the [Lunacy] Act of 1890 (*u*), a person has been appointed with general authority over the lunatic's property, such person has been, and it seems to me reasonably so, treated in the same way as if he were a committee of the lunatic's estate.

"Thirdly, if a person appointed under section 116 has conferred upon him only specified powers falling short of general powers, such person is not to be considered to be in the same position as a committee of the lunatic, and is not entitled to a grant.

"Fourthly, where there is no committee, and no person in the position of a committee, the practice has been to make a grant to another of the next-of-kin of the deceased for the use of the lunatic next-of-kin, so long as he shall remain a lunatic, and the precaution in that case is taken of having the first grant impounded" (*x*).

In such cases, it is not the practice to revoke the old grant and make the fresh grant absolute, even though there appears to be no chance of the lunatic recovering his reason (*y*).

Where one of several administrators becomes insane.

Where one of several administrators becomes insane, the original grant will be revoked and a fresh grant made to the sane administrators (*z*).

(*u*) 53 Vict. c. 5.

(*x*) *In the Goods of Cooke*, [1895] P. 68. See *In the Goods of Binckes*, 1 Curt. 286.

(*y*) *Ibid.*

(*z*) *In the Goods of Phillips*, 2 Add. E. R. 335; *In the Goods of Newton*, 3 Curt. 428; *cf. In the Estate of George Shaw*, [1905] P. 92.

Grants *ad litem* and *pendente lite.*

Where circumstances necessitate the appointment of an administrator *ad litem* or *pendente lite*, such appointment will be made as in the discretion of the judge appears to be required under the special circumstances of the case (*a*).

The functions of an administrator *pendente lite* terminate with the decree which determines the *lis* (*b*).

SECTION III.

OF THE EFFECT OF THE GRANT.

Administrator derives authority from grant alone.

A grant of administration to the estate of an intestate, has an immediate operation corresponding to that which the appointment of an executor by will has at the death of the testator. The administrator to whom the grant is made derives his title entirely from the grant (*c*), and becomes, by virtue of the grant, if made in general form, entitled to the possession and control of all the personal estate of the deceased intestate (*d*), and of such of his real estate as comes within the operation of the Land Transfer Act, 1897 (*e*).

It is to be observed that the Crown is nowhere mentioned in the Land Transfer Act, 1897. It is a well-established maxim of law that the King is not bound by any statute, if he be not expressly named to be so bound (*f*). Therefore, in the event of the death of a bastard intestate and without issue, his real estate

(*a*) 15 & 16 Vict. c. 86, s. 44; 20 & 21 Vict. c. 77, s. 70. See *Tichborne* v. *Tichborne*, L. R. 1 P. & D. 730.

(*b*) *Wieland* v. *Bird*, [1894] P. 262.

(*c*) *Wankford* v. *Wankford*, 1 Salk. 299, 303; *Foster* v. *Bates*, 12 M. & W. 226.

(*d*) Godolph. (3rd ed.), p. 118. (*e*) 60 & 61 Vict. c. 65, s. 1.

(*f*) Jenk. Cent. 307; Wing. Max. 1. See *Att.-Gen.* v. *Donaldson*, 10 M. & W. 123; *Ledsam* v. *Russell*, 1 H. L. C. 697.

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will, as heretofore, escheat directly to the Crown and the usual grant of administration to the solicitor to the Treasury will be limited to the personal estate of the intestate (*g*).

Relation back of grant.

A grant of administration, moreover, has some retrospective operation affecting acts done during the interval which must elapse between the death of the intestate and the date of the grant.

—As regards goods and chattels.

For the protection of the intestate's estate, the doctrine of relation back was established (*h*), by virtue of which the title of the administrator was made to relate to the time of the death of the intestate (*i*), and became, therefore, a sufficient title to found an action of trespass or trover against any person who had dealt wrongfully with the goods of the intestate before the grant (*k*).

—As regards leaseholds and real estate.

The law thus stated with reference to an action of trespass or trover with regard to goods was treated by Lord ELLENBOROUGH as being applicable to the case of leasehold property (*l*); and, now, by virtue of s. 1 (1) of the Land Transfer Act, 1897 (*m*), is applicable to the case of real estate within the purview of that Act (*n*).

Contracts made before grant.

The doctrine has since been extended to enable an administrator to enforce a contract for the benefit of the estate entered into by him, or on his behalf, before grant of administration (*o*). But an administrator is

(*g*) *In the Goods of Hartley*, [1899] P. 40.

(*h*) *Long and Hebb*, Sty. 341; *Foster* v. *Bates*, 12 M. & W. 226; *Morgan* v. *Thomas*, 8 Exch. 302.

(*i*) 1 Com. Dig., p. 455.

(*k*) *Tharpe* v. *Stallwood*, 12 L. J. C. P. (N.S.) 241. See also *Welchman* v. *Sturgis*, 13 Q. B. 552, an action for money had and received.

(*l*) *Rex* v. *Inhabitants of Horsley*, 8 East, 405.

(*m*) 60 & 61 Vict. c. 65.

(*n*) *In the Goods of Pryse*, [1904] P. 301 [C. A.].

(*o*) *Foster* v. *Bates*, 12 M. & W. 226.

not bound after he has obtained grant of administration, to ratify contracts entered into by him, or on his behalf, before the date of the grant (*p*), and acts done by him before the date of the grant will be no estoppel to an action brought by him as a duly constituted personal representative (*q*).

Rule as to dealings with personalty before grant.

With regard to dealings with the personal property of a deceased intestate by an executor *de son tort* in the course of administration but before the grant, it is a general rule that all that has been done by an executor *de son tort* "is made right" if he subsequently take out administration (*r*), and that the effect of letters of administration is to legalise acts done before the grant (*s*).

Title by assignment before grant.

Thus if one enters as executor of his own wrong and sells goods and then obtains administration, the sale is good by relation—the wrong is purged (*t*); so, "where a person sells a lease and afterwards obtains administration, the title goes back by relation" (*u*).

Nevertheless, the title of an assignee who purchases from an executor *de son tort* will not in every case be perfected upon the latter taking out administration to the intestate's estate. The doctrine of relation back being founded on the necessity of protecting that estate will have no application and must not be relied upon, unless the assignment was made in due course of administration and was for the benefit of the estate. Thus where a beneficiary claimed to have derived title through the assent of an executor *de son tort* who had

(*p*) *Doe* v. *Glenn*, 1 A. & E. 49; *Re Watson, Ex parte Phillips*, 19 Q. B. D. 234 [C. A.]. See *Bacon* v. *Simpson*, 3 M. & W. 78.

(*q*) *Metters* v. *Brown*, 1 H. & C. 686.

(*r*) *Hill* v. *Curtis*, L. R. 1 Eq. 90, 100.

(*s*) *Curtis* v. *Vernon*, 3 T. R. 587, 590; Shep. Touch. (ed. Preston), p. 499.

(*t*) *Kenrick* v. *Burgess*, Moo. 126, No. 273; Godolph. (3rd ed.), p. 99.

(*u*) *Hill* v. *Curtis*, *supra*.

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subsequently obtained letters of administration, and it was shown that at the time the assent was purported to be given there were debts still remaining unpaid, it was held that the assignment could not have been for the benefit of the estate and that the doctrine of relation back had no application to the case (*x*).

It would seem that the same rule of law must now obtain with regard to dealings by an executor *de son tort* with the real estate of a deceased intestate before grant of administration (*y*).

Payments to creditor before grant.

It has been decided that payments received by a creditor from an executor *de son tort* in satisfaction of a debt due to him from the intestate, are good, although such executor *de son tort* never afterwards takes out administration, if they were received by the creditor in the reasonable belief that the person paying was the personal representative of the deceased, and had authority to make them (*z*).

Actions by administrator commenced before grant.

The position of a person administering the property of a deceased intestate before grant of administration being merely that of an executor *de son tort* (*a*), his acts lack authority (*b*), and he could not, therefore, as personal representative, bring any action at common law in respect of the estate (*c*). But the rule in the Court of Chancery appears to have been that a bill was not demurrable provided that administration had been taken out before the hearing (*d*). And where an

(*x*) *Morgan* v. *Thomas*, 8 Exch. 302.

(*y*) 60 & 61 Vict. c. 65, s. 2 (2).

(*z*) *Parker* v. *Kett*, 1 Ld. Raym. 661; *Mountford* v. *Gibson*, 4 East, 441; *Thomson* v. *Harding*, 2 E. & B. 630.

(*a*) *Ante*, pp. 20 *et seq.*

(*b*) *Wankford* v. *Wankford*, 1 Salk. 299, 301.

(*c*) *Martin* v. *Fuller*, Comb. 371; *Wankford* v. *Wankford*, *supra*, at p. 303; *Woodridge* v. *Bishop*, 7 B. & C. 406.

(*d*) *Fell* v. *Lutwidge*, Barnd. Ch. Ca. 320; 2 Atk. 120; *Horner* v. *Horner*, 23 L. J. Ch. 10.

executor *de son tort* had also an equitable interest in the subject-matter of the suit, a demurrer on the ground that letters of administration had not been granted at the date of the filing of the bill was not allowed, but the bill was held good by relation (*e*).

Although the rule laid down by the Judicature Act, 1873 (*f*), that, in case of conflict between law and equity, the latter shall prevail, has no reference to rules of practice founded on the difference in the mode of trial obtaining in courts of law and courts of equity (*g*); yet the practice of the various divisions is to be assimilated as much as possible, and the rule of equity will be adopted if it is preferable (*h*).

Effect of revocation of grant.

A revocation of a grant of letters of administration takes effect only from the time of recall, and does not affect acts done by the administrator in the meantime (*i*). Applying this rule to the case of a grant of administration obtained by suppressing a will which contained no appointment of executors, it was held that the grant was not void *ab initio*, and that a sale of leaseholds by the administrator before revocation of the grant was perfectely valid (*k*). Where, however, a grant of letters of administration was obtained by suppressing a will which contained the appointment of an executor, and was subsequently revoked and probate of the will granted to the executor, the grant of letters of administration was held to be wholly void *ab initio* (*l*). In the circumstances of the latter case,

(*e*) *Humphreys* v. *Humphreys*, 3 P. Wms. 349, 351; *Moses* v. *Levi*, 3 Y. & C. 359.

(*f*) 36 & 37 Vict. c. 66, s. 25 (11).

(*g*) *Dalrymple* v. *Leslie*, 8 Q. B. D. 5.

(*h*) *La Grange* v. *McAndrew*, 4 Q. B. D. 210.

(*i*) *Packman's Case*, 6 Rep. 18 b.

(*k*) *Boxall* v. *Boxall*, 27 Ch. D. 220.

(*l*) *Ellis* v. *Ellis*, [1905] 1 Ch. 613.

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speaking generally, dispositions of the assets by the supposed administrator are void also, the ground of this being that the assets are vested in the executor from the death, and the supposed administrator has no property in them and no power of dealing with them (*m*); but acts done in the course of administration and which the executor would have been compelled to do, form apparently, an exception to the general rule and are not impeachable on these grounds (*n*).

(*m*) *Ellis* v. *Ellis*, [1905] 1 Ch., at p. 617.
(*n*) *Graysbrook* v. *Fox*, 1 Plowd. 275.

CHAPTER IV.

OF THE DEVOLUTION OF REAL ESTATE.

Scope and arrangement of chapter.

In explaining the nature of the office of real representative, and again in dealing with the effect of the appointment of an executor, and the grant of letters of administration, there has already been occasion to refer to the vesting of real estate in the personal representative for the purposes of administration. It has been stated, as definitely as might be without anticipating the subject of the present chapter, that, in addition to the goods and chattels and personal estate of the deceased, the estate of the personal representative may now consist of trust and mortgage estates in realty and, since the establishment of the office of real representative by the Land Transfer Act, 1897 (*a*), of real estate within the meaning of that Act. It is here proposed to trace as shortly as possible the steps towards assimilation of the devolution of real and personal estate respectively for purposes of administration achieved by various enactments of which the Land Transfer Act, 1897, is the latest, and to conclude with some explanation of the expression "real estate" within the meaning of that Act. For reasons which will become more apparent as the subject of administration is proceeded with, it is thought proper to preface the discussion of the enactments referred to with some account of the earlier law relating to the devolution of real estate. The present chapter, therefore, is divided into three

(*a*) 60 & 61 Vict. c. 65, *ante*, p. 28.

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sections, dealing, in the order in which they are mentioned, with the estate of the heir at common law, the estate of the devisee under the Wills Act and Statute of Wills, and the estate of the personal representative under the Acts amending the law of devolution of trust and mortgage estates, and under Part I. of the Land Transfer Act, 1897.

SECTION I.

THE ESTATE OF THE HEIR-AT-LAW.

Common law rule as to devolution of real estate.

The relative rights of heir and executor at common law are comprehensively stated in the following passage from the text of Swinburne's Treatise of Testaments and Last Wills (*b*): "As for lands, tenements, and hereditaments of the testator they shall descend to his heir, and shall not come to the executor: for by the laws of this realm, as the heir hath not to deal with the goods and chattels of the deceased, no more hath the executor to do with the lands, tenements, and hereditaments."

Explanation of terms.

A few observations upon the meaning of the technical terms employed in the statement of the common law contained in this passage will aid materially to the subsequent consideration of the changes in the law recently made. Swinburne, it will be observed, contrasts the devolution of lands, tenements, and hereditaments with that of goods and chattels. Now, lands, tenements, and hereditaments, unlike goods and chattels, are not, in the eye of the law, capable of absolute ownership in the hands of a subject of the Crown (*c*),

(*b*) 7th ed., p. 712.

(*c*) Theoretically, the absolute ownership of all land in the United Kingdom is vested in the Crown. A subject may have an interest, more technically called an estate, therein, which estate may be of greater or less duration, but cannot be perpetual. Save in the case of leasehold estates

but must be held for some "estate" or interest of greater or less duration. What is meant, of course, is that as between heir and executor the estate or interest of a deceased owner of lands, tenements, and hereditaments, if that estate is of sufficient duration, will, upon his death, descend to his heir and not to his executor. The use of terms strictly appropriate to things which are the subject-matter of rights and interests to denote, not the things themselves, but rights and interests therein, is not uncommon in the old books, and is a frequent source of confusion; but in modern statutes, particularly, it should be observed, in those enactments, shortly to be referred to, dealing with the law of devolution, all ambiguity in this respect is very generally avoided. In the present instance, the confusion of terms is the more apparent, inasmuch as each of the terms, "lands," "tenements," and "hereditaments," is in itself sufficiently wide to cover property of leasehold tenure, the interest wherein of a deceased owner devolves not upon his heir but upon his executor. The term land has reference strictly to the soil and all that is above and below the soil (*d*), and does not connote any estate, right, or interest therein (*e*); tenement signifies merely that which may be holden (*f*); and hereditament denotes such things as may be the subject-matter of inheritance, but not the inheritance itself (*g*).

"Land."

Tenement.

Hereditament.

or interests which are of later origin, and were not regarded by the ancient common law as estates at all, the estate must also be of indefinite duration. It may be an estate of inheritance, *i.e.*, an estate in fee simple, or in fee tail, or may be an estate for life only. See Goodeve's Law of Real Property (5th ed.), pp. 19 *et seq.*

(*d*) See Co. Lit. 19 b; Shep. Touch. (ed. Preston), p. 90; Goodeve's Law of Real Property (5th ed.), pp. 9, 10.

(*e*) By virtue of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3, in every Act passed after the year 1850, the expression "land," unless a contrary intention appears, includes messuages, tenements and hereditaments, houses and buildings of any tenure.

(*f*) Co. Lit. 6 a, 20 a; Goodeve's Law of Real Property (5th ed.), p. 11.

(*g*) Co. Lit. 6 a; *Moor* v. *Denn*, 2 B. & P. 247; *Tomkins* v. *Jones*, 22 Q. B. D. 599.

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Used collectively in the sense of estates and interests in the subject-matter of property, and in contradistinction to goods and chattels, lands, tenements, and hereditaments are intended to comprise such estates and interests in property as are usually referred to as real property (*h*), but, more technically, as real estate (*i*).

Real estate.

Real property or real estate in the modern acceptation of the term is used to denote any estate, right, or interest other than a chattel interest (*k*) in land, and any such estate, right, or interest incident to or annexed to land (*l*). Perhaps the most comprehensive enumeration of estates and interests usually regarded as real estate is that contained in the Wills Act, which provides (*m*) that the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein.

Heir entitled as blood relation.

To such of the real estate of his ancestor as was descendible the heir succeeded at common law as a

(*h*) See Goodeve's Law of Real Property (5th ed.), p. 9. The term "property" is not a term of ancient art. It is ambiguous, and may denote the thing to which a person stands in a certain relation, and also the relation in which the person stands to the thing, and may be used in the same context in either or both of these senses (*In re Earnshaw-Wall*, [1894] 3 Ch. 156). In the Conveyancing and Law of Property Act, 1881, the expression "property," unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest.

(*i*) Compare the phraseology of the statute 3 & 4 Will. 4, c. 104, where the expression "real estate" is thus used in the clause reading "When any person shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate . . ."

(*k*) Digby Hist. Law Real Property, p. 145.

(*l*) See Co. Lit. 20 a, where estates and interests which savour of the realtie are distinguished from those which "savour nothing of the realtie."

(*m*) 7 Will. 4 and 1 Vict. c. 26, s. 1

blood relation, and in consequence of that relationship (*n*). **Chap. 4.**

Whether the estate of the ancestor were in possession remainder or reversion, the seisin vested in the heir by descent was, unless the land were in the possession of a tenant for years, a seisin in law only (*o*). This seisin he might convert into a seisin in deed (*p*) by entry upon the land which he might make either immediately, if the estate descending were in possession without a right (the ancestor being a married woman) in a surviving husband to take as tenant by the curtesy (*q*) or, if the estate descending were in remainder or reversion, or subject to the husband's estate by curtesy, then upon the determination of the particular estate in possession. Where the land was in the possession of a tenant for years, the possession of the tenant was deemed to be the possession of the heir, and no further entry on the part of the heir was necessary in order to obtain seisin in deed.

—To seisin in law.

—Until entry.

(*n*) By the Roman law, the heir was a person instituted by the party himself, or, in default of such institution, appointed by the law, to succeed both to his real and personal property, and to all his rights and obligations. In the feudal law, he is a person related in blood to the ancestor; and, in consequence of that relationship, entitled, either merely by act of law, or, by the concurrent effect of law and the charter of investiture, to succeed, at the ancestor's decease, to his real or immovable property, not given away from him by will. In the civil law he was considered as representing the person of the deceased; in consequence of that supposed representation, the law cast on him the property and rights of the deceased, and fixed on him all the deceased's charges and obligations. Thus, by a fiction of the law, the person of the ancestor was continued in the heir, so that in all religious, moral and civil rights and obligations the heir, in the language of the Roman lawyers, was *eadem persona cum defuncto*. In the feudal system he succeeded to the real property only of the ancestor; and this, not under any supposed representation to him, or in consequence of any supposed continuation of his person, but as related to him in blood, and in consequence of that relationship, as a person designated by the original feudal contract to succeed to the fief (Co. Lit. 191 a, vi. 3).

(*o*) Co. Lit. 15 a, 29 a.

(*p*) For a learned dissertation as to the practical importance at common law of the distinction between seisin in law and seisin in deed, see Challis' Law of Real Property (2nd ed.), pp. 205 *et seq.*

(*q*) See as to the nature of the estate by the curtesy, Goodeve's Law of Real Property (5th ed.), pp. 102 *et seq.* The right of a widow to dower out of the real estate of her deceased husband did not prevent the estate descending as an estate in possession immediately upon the heir.

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Estates *pur autre vie.*

An estate *pur autre vie* limited to a person, his heirs and assigns, though real estate, is not an estate of inheritance, and is not descendible (*r*), but at common law devolved upon the death of the tenant *pur autre vie* upon the heir named in the grant as special occupant, that is to say, as a *persona designata* taking by way of purchase, and not by descent (*s*).

Estates tail.

Prior to the Statute *De Donis Conditionalibus* (*t*), a limitation of real estate to A. and the heirs of his body was held to confer upon A. a fee simple conditional. By that statute an estate tail, although an estate of inheritance, was made to take effect *per formam doni*, the result of which was, at first, to confer indefeasible estates in remainder upon the issue in tail and remainderman. The power of the tenant in tail to alienate and so bar the estates in remainder was, however, asserted in *Taltarum's Case* (*u*), and is now regulated by the Fines and Recoveries Act, 1833 (*x*). If the tenant in tail takes advantage of this power he may enlarge his estate into a base fee or fee simple, as the case may be; but if he dies tenant in tail, his heir in tail will still succeed *per formam doni* as well as by descent (*y*).

Copyholds.

Upon the death of a person entitled to a legal estate of inheritance in lands of copyhold tenure, the whole customary estate of the tenant, subject to any customary estate by the curtesy, descended at common law (*z*), and at the present day still descends, upon the customary

(*r*) Challis' Real Property (2nd ed.), p. 327; *Re Michell, Moore* v. *Moore*, [1892] 2 Ch. 87, 96.

(*s*) *Northern* v. *Carnegie*, 4 Drew. 587, 590; *Ripley* v. *Waterworth*, 7 Ves. 425, 438; *Re Michell, Moore* v. *Moore, supra.*

(*t*) 13 Edw. 1, c. 1.

(*u*) Year Book, 12 Edw. 4, c. 19.

(*x*) 3 & 4 Will. 4, c. 74.

(*y*) 10 Vin. Abr. tit. Estates, 267.

(*z*) *Matthew* v. *Osborne*, 13 C. B. 919; *Garland* v. *Mead*, L. R. 6 Q. B. 441.

heir (*a*). Even though the property be included in a devise of real estate made subsequently to the Wills Act (*b*), this will not prevent the legal estate from descending to the heir and continuing in him until the devisee named in the will has been admitted tenant (*c*). The heir must nevertheless present himself in due course according to the custom of the manor for admittance; for, although it will appear from the court rolls that the heir is entitled to the legal estate by operation of law, yet the lord, on the other hand, is entitled to insist that he shall not be without either a tenant or the possession of the land (*d*). In order effectually to secure this right, if the heir fails to tender himself for admittance within the period prescribed by the custom of the manor, the lord is entitled, after proclamations have been duly made according to the custom of the manor, to seize *quo usque*, *i.e.*, until the heir tenders himself for admittance.

Escheat.

If the owner of real estate dies leaving no heir-at-law, the immediate lord of the fee becomes entitled by escheat to the property in which the estate subsists (*e*).

SECTION II.

THE ESTATE OF THE DEVISEE.

No common law power of testamentary alienation.

Swinburne observes that lands, tenements, and hereditaments cannot be disposed or devised by will, but in certain cases, of which some are approved by force

(*a*) See *post*, p. 81.

(*b*) 7 Will. 4 & 1 Vict. c. 26.

(*c*) *Garland* v. *Mead*, *supra*.

(*d*) *Glass* v. *Richardson*, 2 De G. M. & G. 658, 662.

(*e*) Co. Lit. 13 a. Mesne tenure having now generally disappeared, the Crown is generally entitled to take by escheat in the case of freeholds and the lord of the manor in the case of copyholds. The Land Transfer Act, 1897, does not affect the law of escheat, *ante*, p. 50.

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of certain customs and some by force of certain statutes (*f*).

—Except by force of custom.

The customs referred to are the custom of gavelkind in Kent and the customs of certain cities and boroughs, among which may be mentioned the cities of London, York, and Oxford; but since an enactment in the reign of Charles II. (*g*) requiring every devise of land devisable by force of any such custom to be made with the same formalities as are required by statute in the case of lands devisable by statute, these customs have ceased to be of practical importance.

History of introduction of power.

The history of the introduction into the law of the power to dispose by will of real estate has at the present day a considerable bearing upon the relative rights of heir and devisee in regard to lands of copyhold tenure, and may be shortly summarised as follows: The rule of the common law (*h*) until the Statute of Wills was passed in the year 1540 (*i*) was that no greater estate than an estate for a term of years could be the subject of a device by will (*k*), except by force of one or other of the particular customs already referred to. So soon, however, as the power of alienation *inter vivos* had been conferred by the Statute *Quia Emptores* (*l*), the practice arose of making a feoffment to uses to be declared by the will of the feoffor, and the Court of Chancery assumed jurisdiction to enforce the will as a good declaration of the uses thereby declared. Thus, through the medium of uses, the power of devising was continually exercised in effect

Device of feoffment to uses.

(*f*) Swinb. (7th ed.), p. 205; Co. Lit. 111 a.

(*g*) 29 Car. 2, c. 3, s. 5.

(*h*) Although lands are said to have been devisable before the Conquest (see Wright on Tenures, p. 172), the power of testamentary alienation, if any, necessarily ceased with the introduction of feudal tenures, to the conception of which all power of alienation was entirely foreign.

(*i*) 32 Hen. 8, c. 1.

(*k*) 2 Inst. 7.

(*l*) 18 Edw. 1, c. 1.

Statute of Uses.

and reality (*m*). The practice of making feoffments to the uses of wills was designedly checked by the Statute of Uses (*n*), which, by transferring the possession or legal estate to the use, had the effect of destroying all distinctions between them. A few years later, however, by the Statute of Wills (*o*), power was given to all persons having estates in fee simple (other than estates in joint tenancy) to devise the whole of their socage land and two-thirds of any land held by knight service. By the combined effect of this statute and the statute 12 Car. 2, c. 24, abolishing feudal tenures, all freehold land held for an estate in fee simple became devisable.

Statute of Wills.

Estates *pur autre vie*.

Estates *pur autre vie* in lands of freehold tenure and customary estates in lands of copyhold tenure remained undevisable, for the former not being estates in fee simple, and the latter not being in the nature of socage tenure, were not within the Act, and being real estate were not devisable at common law (*p*). Estates *pur autre vie* were shortly afterwards, however, made devisable by the Statute of Frauds (*q*).

Copyholds.

In the absence of any power of disposing by will of the legal estate in lands of copyhold tenure, a power of devising the customary fee was nevertheless indirectly exercised by means of a device similar to that employed before the Statute of Wills in the case of freeholds, namely, by a surrender to the use of the will of the surrenderor. By the statute 55 Geo. 3, c. 192, a devise of any interest in copyhold tenements was made as valid and effectual for all purposes without any previous surrender to the use of the will as it would have been if such surrender had been made. The effect of this

(*m*) Co. Lit. 111 b, Hargrave's note; 1 Saund. Uses, 64; Wright's Tenures, 172, 174.

(*n*) 27 Hen. 8, c. 10.

(*o*) 32 Hen. 8, c. 1, explained by 34 & 35 Hen. 8, c. 5.

(*p*) Swinb. (7th ed.), p. 212, note; Co. Lit. 111 b, Hargrave's note.

(*q*) 29 Car. 2, c. 3, repealed, but re-enacted 7 Will. 4 & 1 Vict. c. 26.

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enactment was merely to supply the want of a surrender (*r*), leaving the status of the devisee unaffected (*s*). By virtue of the devise the devisee took, not an equity, but an inchoate legal title to be perfected by admittance (*t*), and which, before admittance, did not enable him to make a title to a stranger (*u*).

Wills Act.

The power of testamentary disposition is now governed by the Wills Act, 1837 (*x*), which, repealing all previous enactments on the subject, gives power to every person to devise or dispose of by will all real estate as therein defined to which he shall be entitled at law or in equity at the time of his death, "and which if not so devised or disposed of would devolve upon the heir-at-law or customary heir of him, or, if he became entitled by descent, of his ancestor." The power extends to real estate of copyhold or customary freehold tenure, "notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto," and notwithstanding any special custom, which, but for the Act, would have prevented the devise; it extends also to estates *pur autre vie* of any tenure, whether there be any special occupant or not, "and whether the same shall be a corporeal or an incorporeal hereditament"; also to contingent, executory, or other future interests, "whether the testator may or may not be ascertained as the person or one of the persons in whom the same

(*r*) *Garland* v. *Mead*, L. R. 6 Q. B. at p. 447.

(*s*) *Matthew* v. *Osborne*, 13 C. B. 919, at p. 944.

(*t*) *Phillips* v. *Phillips*, 1 My. & K. 649.

(*u*) *Doe* d. *Vernon* v. *Vernon*, 7 East, 8. The position of the devisee is perhaps better expressed in *Garland* v. *Mead*, *supra*, p. 499, where BLACKBURN, J., says "the devise simply passed the right to be admitted . . . if this had been a devise under the old law, the devisee would not have had any title till admittance."

(*x*) 7 Will. 4 & 1 Vict. c. 26.

respectively may become vested," and to rights of entry for condition broken and other rights of entry (*y*).

Estates tail.

This enactment confers, of course, no power of testamentary alienation in respect of estates tail which, as such, are not in their nature devisable (*z*), but subsist in the eye of the law as mere life estates (*a*), and leaves untouched the distinction which formerly existed between a devise of freeholds and a devise of copyholds, that is to say, that whereas the former operated as a legal conveyance to the devisee of the estate devised to him (*b*), divesting the heir of the estate which would otherwise have devolved upon him, the latter passed no estate to the devisee, but merely the right to be admitted (*c*), and did not, therefore, divest the estate of the heir.

Operation of devise of freeholds.

Of devise of copyholds.

SECTION III.

THE ESTATE OF THE PERSONAL REPRESENTATIVE.

Common law rule as to devolution of trust and mortgage estates.

With freehold estates of inheritance the personal representative had no concern at common law. The course of devolution of real estate upon the heir in accordance with settled rules of descent, and, later, upon the devisee when real estate became devisable, was not altered by the fact that the estate descending or devised was held upon trust or by way of mortgage.

Device of specially devising trust and mortgage estates.

As a means of obviating some of the inconveniences resulting from this state of the law, as for instance the splitting up of trust property upon the death of a sole

(*y*) See *Pemberton* v. *Barnes*, [1899] 1 Ch. 544.

(*z*) 13 Edw. 1, c. 1. See the translation in Digby's Hist. Law of Real Property, p. 186 ; Co. Lit. 111 a.

(*a*) *Pagget* v. *Gee*, 9 Mod. 482.

(*b*) *Hogan* v. *Jackson*, 1 Cowp. 299 ; Co. Lit. 191 a, n. vi. 10.

(*c*) *Garland* v. *Mead*, L. R. 6 Q. B. 441 ; *Lacey* v. *Hill*, 19 L. R. Eq. 346.

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trustee of real and personal estate, and, in the case of mortgages of real property, the separation upon the death of the mortgagee of the legal estate in the mortgaged property from the right to recover the mortgage debt, it was the usual practice to insert in wills of real estate a separate devise of freeholds and copyholds vested in the testator as trustee or mortgagee; but the result of the enactments about to be considered has been to render this expedient unnecessary save in the case of copyholds to which the testator was admitted tenant on the Court Rolls. Indeed, any devise of freehold trust or mortgage estate is now altogether inoperative.

Vendor and Purchaser Act, 1874, ss. 4, 5.

The first step in the direction of assimilating the devolution of real and personal estate was the passing of the Vendor and Purchaser Act, 1874 (*d*). By s. 4 of that Act it was provided that the personal representative of a mortgagee of freeholds, or of copyholds to which the mortgagee had been admitted, might on payment of the mortgage monies convey or surrender the mortgaged estate; and by s. 5 of the same Act, upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament was made to vest like a chattel real in his personal representative.

The former section was repealed and in effect superseded in cases of death after 1881 by s. 30 of the Conveyancing and Law of Property Act, 1881, the full text of which is given below, but remains in force in cases of death before January 1st, 1882, or at any rate from the date of its enactment until that date (*e*). The latter section was repealed by s. 48 of the Land

(*d*) 37 & 38 Vict. c. 78.

(*e*) See *Spradbery's Mortgage*, 14 Ch. D. 514; *Re White's Mortgage*, 29 W. R. 820.

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Land Transfer Act, 1875.

Transfer Act, 1875 (*f*), which enacted, instead thereof, that upon the death of a bare trustee intestate as to any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament should vest like a chattel real in the legal personal representative from time to time of such trustee; but the last-mentioned enactment (*ff*) did not apply to lands registered under the Act of 1875.

Conveyancing and Law of Property Act, 1881, s. 30.

A more extended and important alteration in the law as to the devolution of real estate held upon trust or by way of mortgage was effected by s. 30 of the Conveyancing and Law of Property Act, 1881 (*g*), which enacts as follows:

Devolution of trust and mortgage estates on death.

"(1) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives for the time being of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

"(2) Section 4 of the Vendor and Purchaser Act, 1874, and s. 48 of the Land Transfer Act, 1875, are hereby repealed.

(*f*) 38 & 39 Vict. c. 87. As to the transmission on death and bankruptcy of charges registered under this Act, see ss. 42, 43.

(*ff*) Repealed, *infra*.

(*g*) 44 & 45 Vict. c. 41.

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"(3) This section, including the repeals therein, applies only in cases of death after the commencement of this Act."

Copyhold Acts, 1887 and 1894.

The above section, having been held to apply to copyholds (*h*) was repealed as to copyholds to which the deceased trustee or mortgagee was admitted tenant in his lifetime by the Copyhold Act, 1887 (*i*), which last-mentioned enactment was in turn repealed by the Copyhold Act, 1894 (*k*), by s. 88 whereof it is enacted that:

"Section 30 of the Conveyancing and Law of Property Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls on trust or by way of mortgage."

Result of legislation as regards trust and mortgage estates.

The effect of this legislation has been completely to assimilate the devolution of freehold real and personal estate held upon trust or by way of mortgage, but the legal estate in lands of copyhold tenure, whether held upon trust or by way of mortgage (*l*) or not (*m*), and whether or not comprised in any testamentary disposition (*n*), must upon the death of the person admitted tenant on the Court Rolls devolve now, as at common law, upon his customary heir.

It should be added that the provisions of s. 30 of the Conveyancing and Law of Property Act, 1881, cannot be evaded by the appointment of special executors of trust and mortgage estates (*o*).

Land Transfer Act, 1897.

The last and most radical alteration in the law relating to the devolution of real estate has been that

(*h*) *Re Hughes*, W. N. (1884), p. 53.

(*i*) 50 & 51 Vict. c. 73, s. 45. (*k*) 57 & 58 Vict. c. 46, s. 88.

(*l*) As to the case of the sole trustee dying between the commencement of the Act of 1881 and the passing of the Act of 1887, see *Re Mills*, 37 Ch. D. 312.

(*m*) See *post*, p. 81. (*n*) *Ante*, pp. 61, 65.

(*o*) *Re Parker's Trusts*, [1894] 1 Ch. 707.

effected by the Land Transfer Act, 1897 (*p*), by the establishment of a real representative in the person of the personal representative of the deceased owner.

How far a natural consequence of Lord Romilly's Act.

As will be seen hereafter, the primary duty of a personal representative is the payment of the debts of the person whom he represents. For this purpose, indeed, according to Wentworth (*q*), the whole of the personal estate of a deceased person devolved at common law upon his personal representative *virtute officii* and was applicable in payment of all kinds of debts in their proper order (*r*). Real estate, on the other hand, was applicable at common law in the hands of the heir-at-law of the deceased debtor in payment only of the debts of a single class of creditors, *i.e.*, the favoured few whose debts were by specialty in which the heir was expressly bound (*s*). So long as freehold estates of inheritance remained beyond the reach of the general body of creditors of the deceased owner there could of course be no real representative in the sense in which that expression is now commonly used (*t*); but so soon as the remedy of the single class of creditors referred to was extended to all, and real estate became generally applicable in payment of debts on the death of the owner, questions as to the desirability of establishing a real representative, whose primary duty should be the administration of the real estate of the deceased debtor in payment of his debts, and, for that purpose, of altering the law as to the devolution of real estate so as to make it vest in the first instance in such real representative, at once assumed practical importance (*u*).

(*p*) 60 & 61 Vict. c. 65.

(*q*) Wentw. Off. Ex. (14th ed.), p. 10.

(*r*) *Post*, p. 108.

(*s*) *Post*, p. 121.

(*t*) *Ante*, p. 7.

(*u*) See the observations of Mr. Joshua Williams in the Appendix to his treatise on Real Assets. The learned author points out some of the evils attending a divided administration, and having regard to the law (the same then as now) relating to the liability of real estate to the payment of debts, suggests as a remedy much the same changes as have at length been effected by the Land Transfer Act, 1897.

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The existing liability of real estate to be applied in payment of the debts of the deceased owner was completely established by Lord Romilly's Act (*v*) so long ago as the year 1833. If reference be made to the text of that Act, which will be found set out and fully discussed in a subsequent chapter (*x*), it will be seen that after establishing in the first place the liability of real estate to answer the debts of the deceased owner, the Legislature proceeded to prescribe what was to be the remedy of the creditor, namely, a suit in equity against the heir or devisee as the case might be. But neither heir nor devisee, it will be observed, was made responsible for the administration out of Court of real estate devolving upon him. Indeed, prior to the year 1898, and save in the case of real estate charged with or devised in trust for the payment of debts, there was no system of administration out of Court of real estate. The creditor, if he claimed by specialty binding upon the heir, might bring an action at law against the heir or devisee; otherwise he must have had resort to his remedy by suit in equity provided by Lord Romilly's Act. In the case of real estate charged with or devised in trust for the payment of debts the devisee, it is true, became responsible to the extent of the trust reposed in him; but if he were not also appointed to be executor, the real and personal estate respectively of the deceased owner became subject to administration in different hands, causing no little inconvenience to all parties (*y*).

Circumstances bearing upon the construction of the Act of 1897.

Bearing in mind what has already been said as to the state of the law prior to the year 1898, and that chief among the evils then demanding attention were the absence in many cases of any system of administration out of Court of real estate and the constantly

(*v*) 3 & 4 Will. 4, c. 104. (*x*) *Post*, p. 132.
(*y*) See Goodeve's Law of Real Property (5th ed.), pp. 121, 122.

recurring cases of divided administrations, bearing in mind also that the object of Part I. of the Land Transfer Act, 1897, was *ex facie* the establishment of a real representative (*z*), there should be no real difficulty in arriving at the true construction of the provisions of the first or vesting clause of that Act, which enacts as follows:

Devolution of legal interest in real estate on death.

"Section 1.—(1) Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

"(2) This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him.

"(3) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

"(4) The expression 'real estate,' in this part of this Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

"(5) This section applies only in cases of death after the commencement of this Act."

"Real estate" within the meaning of the Act of 1897.

The use of so general an expression as "real estate" to denote the interests in real property to be included within the operation of the Act has afforded scope for one of the many criticisms launched against the phraseology of this and the remaining four sections of which Part I. of the Act is comprised. Both estates for life and estates tail, it has been urged, are within the category of real estate, and are therefore brought within the operation of the Act. It is nevertheless submitted that for the purpose of describing those interests in real property capable of being administered

(*z*) *Ante*, p. 8.

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in accordance with the remaining provisions of the Act, namely, the provisions for administration contained in the second section, it would be difficult to find an expression more apposite than "real estate." "Any estate or interest in lands tenements or hereditaments, corporeal or incorporeal *or other real estate*" is the description contained in Lord Romilly's Act (*a*) of those interests in real property which thenceforward became available as assets for the payment of debts generally, and therefore capable of administration in accordance with the provisions of the later Act. The evils which in 1897 were in want of redress, it has already been shown, were evils merely of administration, or want of administration, and the object of the Act of 1897 was the introduction of a system of administration by the establishment of a real representative (*aa*). These considerations appear sufficient to justify the conclusion that the meaning (*b*) intended to be conveyed by the use of the expression "real estate" is the same in both enactments; and it may be gathered from the context of the earlier, as well as from that of the later, of the two enactments that by "real estate" is intended only those estates or interests in real property which are of a continuing or transmissible nature and devisable.

Interests of a continuing or transmissible nature and devisable.

Estates for life and estates tail.

It is matter of common knowledge that neither estates for life (other than estates *pur autre vie*) nor estates tail are counted among those interests to which

(*a*) 3 & 4 Will. 4, c. 104.

(*aa*) See *Re Williams, Holder* v. *Williams*, [1904] 1 Ch. 52, 56.

(*b*) The rules applicable to the construction of Acts of Parliament may be summarised from Maxwell's Interpretation of Statutes, pp. 29, 30, 40, 46, 50, as follows: (1) To arrive at the real meaning it is always necessary to get an exact conception of the aim, scope and object of the whole Act (*River Wear Commissioners* v. *Adamson*, 2 App. Cas. 743), some indication of which may be afforded by the history and external circumstances leading to the enactment. (2) The whole Act must be surveyed, and where there are earlier Acts relating to the same subject, the survey must extend to them; for all are, for purposes of construction, considered as forming one homogeneous and consistent body of law. (3) It is presumed that the Legislature uses the same language in the same sense when dealing at different times with the same subject.

Lord Romilly's Act applies. An estate for life is not of a continuing nature, and an estate tail is neither transmissible as such (*c*) nor devisable (*d*). It seems, therefore, safe to assume that neither of these estates is real estate within the meaning of the first section of the Land Transfer Act, 1897.

Estates in fee simple.

Base fees.

Of estates of inheritance, an estate in fee simple is, of course, "real estate" within the meaning of the section. A base fee created by an assurance by a tenant in tail insufficient to bar the remainderman, but barring the heirs in tail, is merely a qualified fee simple (*e*). Such an estate is descendible to the heirs general of the owner, and, subject to its liability to determine upon failure of the heirs in tail, may be disposed of by him by deed or will in all respects as a fee simple absolute (*f*). It is therefore "real estate" within the meaning of the section.

A base fee created by an assurance to a third person, which assurance has not been enrolled, and is therefore insufficient under the Fines and Recoveries Act, 1833 (*g*), to bar the issue in tail, becomes in the hands of the alienee an estate *pur autre vie* (*h*), or, at any rate, an estate liable to be determined by entry of the issue in tail upon the death of the original tenant in

(*c*) *Re Dunsany's Settlement, Nott* v. *Dunsany*, [1906] 1 Ch. 578. See *In re Gaskell and Walter's Contract*, [1906] 2 Ch. 1, 9, where it was held that s. 10 of the Forfeiture Act, 1870, which provides that all the real and personal property of a convict shall vest in the administrator appointed under the Act "for all the estate and interest of such convict therein" could have no greater effect on property of which the convict was tenant in tail than to vest in the administrator a conditional fee determinable by entry of issue or remainderman.

(*d*) *Ante*, p. 65.

(*e*) See 1 Prest. Abstr. 372.

(*f*) Power to enlarge a base fee is, by s. 19 of the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), confined to "the person who, if such estate tail had not been barred, could have been actual tenant in tail of the same lands," and by s. 1 of the same Act, the expression "actual tenant in tail" is defined to "mean exclusively the tenant of an estate tail which shall not have been barred."

(*g*) 3 & 4 Will. 4, c. 74.

(*h*) Co. Lit. ss. 613, 650.

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tail (*i*). Upon the death of the alienee, real estate so held by him will apparently devolve in the same way as any other estate held *pur autre vie*.

Estates *pur autre vie*.

Upon the death of a tenant *pur autre vie*, whose estate was granted without any words of limitation, the seisin was at common law in abeyance until entry of some person into possession (*j*), and the first person who entered into possession became seised as general occupant, by virtue of such entry, of an estate determinable upon the death of the *cestui que vie* (*k*). General occupancy was abolished by the Statute of Frauds passed in the reign of Charles II., and by the same statute an estate *pur autre vie* conferred without any words of limitation, or limited to a man, his executor, administrators and assigns, was made to vest upon the death of the tenant in his personal representative (*l*). By the same statute also, an estate *pur autre vie*, though limited to a man, his heirs and assigns, if disposed of by the will of the tenant, devolved upon his personal representative. It was left to the Land Transfer Act, 1897, to deal with the case of an estate *pur autre vie* limited to a man, his heir and assigns of which no disposition has been made by the will of the tenant, and thus to assimilate the devolution of all estates *pur autre vie*. That the latter Act does have this effect would seem to follow from the fact that such an estate is real estate, transmissible by the tenant in his lifetime (*m*) and devisable (*n*).

Contingent interests.

The only express qualification to "real estate" contained in the vesting section of the Act of 1897 is that

(*i*) *Machell* v. *Clarke*, 2 Ld. Raym. 778; *Tyrrell* v. *Meade*, 3 Burr. 1705.

(*j*) Co. Lit. 342 b.

(*k*) See Goodeve's Law of Real Property (5th ed.), p. 129.

(*l*) 29 Car. 2, c. 3, s. 12; 14 Geo. 2, c. 20, s. 9; Co. Lit. 41 b, Hargrave note 5. See 7 Will. 4 & 1 Vict. c. 26, s. 6.

(*m*) Challis R. P. (2nd ed.), p. 329. (*n*) *Ante*, pp. 63, 64.

it must have been "vested" in the deceased owner "without a right in any other person to take by survivorship." What has already been said as to the meaning of real estate should be sufficient to dispose of any ambiguity which might be suggested by the use of the word "vested" in this section. The primary meaning of "to vest" is explained by Mr. Vaughan Hawkins, in his Treatise on the Construction of Wills (*o*), as follows: "Originally the word had reference only to real estate. As applied to *estates* in land, 'to vest' signifies the acquisition of a portion of the actual ownership or feudal possession of the land ('*vestire — seisinam dare-infeodare:* Spelman): the acquisition, not of an estate *in possession*, but of an actual estate. The fee simple being supposed to be carved out into parts or divisions by the creation of particular estates, a grant to any person of one of these portions of the fee vested him with, or vested in him, an estate in the land. Thus 'vested' is nearly equivalent to 'possessed.' In this, its original sense, 'vested' has no reference to the absence of *conditional*ness or contingency."

The same writer proceeds to trace the derivative meaning of the word to the opposite of "contingent" or "conditional"; but points out that in this derivative sense "vested" has no application to future executory interests in land, not taking effect as remainders (*p*).

It is to be observed that by the concluding words of s. 1 (1) of the Act real estate vested in a deceased owner is made to vest in his personal representatives or representative as if it were a chattel real vesting in them or him; and in connection with the devolution upon death, of personalty and chattel interests in

(*o*) Page 221.
(*p*) Hawkins' Treatise on the Construction of Wills, p. 222.

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realty, the word "to vest" is commonly used, in the primary sense above mentioned, to denote the acquisition by the personal representative of all rights and interests whatever devolving upon him by virtue of his office for purposes of administration without any regard to the conditional nature of the interests so devolving.

It may be concluded, therefore, that the word "vested" in s. 1 (1) of the Act is to be construed in its primary sense, and not as restricting the operation of the Act to interests in real estate of a non-contingent or unconditional nature only; and that real estate to which a person may become entitled by way of shifting use, executory devise, or contingent remainder is real estate within the purview of the Act, which, upon the happening of the event upon which the estate is made contingent or conditional, will devolve upon his personal representative in the same manner as other real estate.

Joint tenancies.

The words "without a right in any other person to take by survivorship" are words of technical import, and refer to the *jus accrescendi* of joint tenants. Where an estate is limited by deed or will to several persons and their heirs, or heirs and assigns, a joint tenancy is created, the legal effect of which is that the donees are collectively regarded as a single person; on the death of one or more of the component individuals making up that person, the others or other surviving take the whole of the estate between them or solely, as the case may be (*q*); and it is not till the death of the last survivor that this Act will come into operation and divert into the hands of the personal representatives of such survivor the property which, but for the Act, would have passed to his heir-at-law or devisee.

(*q*) Bac. Abr. (7th ed.), tit. Joint Tenants (A.); Co. Lit. 184 a.

Tenancies in common.

If a joint tenant disposes of his interest (as he may do by alienation *inter vivos*, but not by will), and so severs the joint tenancy, the unity of title will be destroyed, and a tenancy in common will be created, which will let in the operation of the Act (*r*).

Estates of coparceners.

The above remarks do not apply to coparceners. They take by descent, and between them there is no right of survivorship on death of a coparcener; their estates and interests are otherwise generally the same as those of joint tenants, except that as between coparceners there is no entirety of seisin, and that, independently of statute, any one of them has always had the right to compel her co-owners to make partition (*s*). Before the Inheritance Act, 1833 (*t*), came into operation, a devise of real estate to the co-heiresses of the testator did not prevent them from taking by their better title as coparceners by descent; but, by virtue of s. 3 of that Act, under a devise to the heir, or to the right heirs of the testator, co-heiresses answering that description will take now as devisees and, therefore, as joint tenants (*u*).

Tenancy by entireties.

A conveyance of real estate to husband and wife jointly during coverture, created, prior to the Married Women's Property Act, 1882 (*v*), a tenancy by entireties. Real estate so held is not "vested in any person without a right in any other person to take by survivorship" for husband and wife, being seised of the entirety *per tout*, and not, as in cases of joint tenancy, *per my et per tout*, neither can alien so as to bind the estate of the other (*w*), but, upon the death of either, the

(*r*) Co. Lit. 186 a.

(*s*) Bac. Abr. (7th ed.), tit. Coparceners. See *Cooper* v. *France*, 14 Jur. I., 214; Cru. (4th ed.), vol. ii., p. 394; *Re Matson*, [1897] 2 Ch. 509.

(*t*) 3 & 4 Will. 4, c. 106.

(*u*) *Owen* v. *Gibbons*, [1902] 1 Ch. 636 [C. A.].

(*v*) 45 & 46 Vict. c. 75.

(*w*) *Back* v. *Andrew*, 2 Vern. 120; Co. Lit. 326 a.

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tenancy is determined and the survivor becomes solely entitled under the conveyance.

Estate of husband and wife in right of the wife.

As regards real estate of the wife of which, upon marriage prior to the Married Women's Property Act, 1882 (*x*), husband and wife have become seised in fee in right of the wife (*xx*), the following considerations seem to apply. Upon the death of the husband in the lifetime of the wife, the latter becomes solely seised of the property, which she may dispose of by deed or will as she pleases, and which, upon her death, will devolve under the Land Transfer Act, 1897, upon her personal representative. Upon the death of the wife in the lifetime of her husband, the estate descended at common law, and, it is thought, will still descend notwithstanding the Act, upon her heir-at-law, subject to any estate to which her husband may be entitled as tenant by the curtesy. It is not suggested that, in the latter case of the wife predeceasing her husband, the husband has any right to take by survivorship within the meaning of the first section, for his estate by the curtesy is not the estate which, during his wife's lifetime, he had in her right (*y*), but that the estate of the wife not being devisable (*z*) nor capable of being bound by her contracts to the prejudice either of her husband or heir-at-law, is not "real estate" within the purview of the Act.

Equitable separate estate and statutory separate property.

It should be observed that entirely different considerations apply to the case of real estate which is the equitable separate estate or statutory separate property of a married woman, and that there is nothing in the equitable estate or right of the surviving husband which the law recognises in respect of real estate, so held, inconsistent with the assumption that such real estate

(*x*) 45 & 46 Vict. c. 75.

(*xx*) Co. Lit. 67 a.

(*y*) See Co. Lit. 30 a, 67 a.

(*z*) 34 & 35 Hen. 8, c. 5; *Willock* v. *Noble*, L. R. 8 Ch. App. 778; affirmed L. R. 7 H. L. 580.

devolves in accordance with the Act upon the personal representative of the married woman.

Equitable interests in real property

It was for some time doubted whether the vesting section of the Act extended to equitable as well as legal interests in real property. The marginal note to the section, it will be observed, speaks only of the devolution of legal interests in real estate; but the marginal notes to an Act of Parliament are not now deemed part of it (*a*), and it has already been decided that equitable interests devolve under the Act in the same way as legal interests. In *Re Somerville and Turner's Contract* (*b*), KEKEWICH, J., in so deciding, after observing that to hold otherwise would be to take away a part of the remedy designed by the Act, continues, "It is well known to members of the legal profession that the title to a large number of estates, including freeholds, is equitable only, as, for example, when an outstanding estate in a mortgagee or vested in the trustee of an old settlement or will, has been overlooked and never been conveyed. Difficult questions sometimes arise respecting the devolution of the legal estate, and the Court is accustomed to regard an estate in land in the same way whether it is equitable or legal. On a reference to chambers in an ordinary partition action there is an inquiry to ascertain the persons entitled to the real estate, though their interests are equitable only; and, as regards heirship, the devolution of equitable estates is governed by the same rules as that of the legal estate. That is common knowledge, and it is almost impossible to conceive that when the Legislature provided for the real estate being vested in the personal representative in the same way as a chattel real it was intended that equitable estates should not be affected. An executor takes the chattels real of his testator whether equitable

(*a*) *Sutton* v. *Sutton*, 22 Ch. D. 511. See *Claydon* v. *Green*, L. R. 3 C. P. 511.

(*b*) [1903] 2 Ch. 583, at p. 587.

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or legal, an equity of redemption as much as an original lease."

Equity of redemption.

It is well settled that where real estate is in mortgage, the equity of redemption, until foreclosure, is not merely a right of entry on payment of the mortgage moneys, but an estate vested in the mortgagor as the real owner, to which, subject and without prejudice to the mortgage, the ordinary incidents of ownership attach. Where, therefore, the owner of mortgaged real estate, of which the legal estate was outstanding in a trustee, died intestate, it was held that the section applied so as to vest the real estate in the administrator of the deceased as if it were a chattel real, and that s. 2 (2) of the Act conferred upon him all the rights and liabilities he would have had in respect of a chattel real, including the right to redeem and the liability to be sued in a foreclosure action (*c*).

Real estate appointed under general power.

Real estate over which a person executes by will a general power of appointment is expressly brought within the operation of the Act by sub-s. (2) of the first section.

Former effect of appointment under general power.

As will be seen later, both real (*d*) and personal (*e*) estate actually appointed by will under a general power of appointment in that behalf, have long been held to be assets for the payment of the debts of the deceased appointor. But in the case of realty so appointed, the effect of the appointment was to vest the property directly in the appointee, with the result that a purchaser for value from such appointee could set up a good title as against creditors of the deceased appointor seeking to follow the assets (*f*).

(*c*) *Re Harrowby and Paine's Contract*, [1902] W. N., p. 137.

(*d*) *Post*, p. 134.

(*e*) *Post*, p. 129.

(*f*) *George* v. *Milbanke*, 9 Ves. 190; *Hart* v. *Middlehurst*, 3 Atk. 937; Sugd. Powers (8th ed.), 477.

Present effect of appointment of real estate under general power.

The present Act, by expressly enacting that real estate appointed by will, like real estate vested in the deceased person, shall pass to his personal representatives on his death, seems to deprive the appointee of any immediate estate or interest in the property, so that he cannot make a good title to it or effectually convey it to a purchaser, until the personal representatives have assented to the appointment or conveyed the property to the appointee.

Exception of copyhold and customary freeholds.

Estates of copyhold and customary freehold tenure, the title to which must be perfected by admission or some act of the lord of the manor, are expressly excepted from the operation of the Act by sub-s. (4) of s. 1.

This exception extends only to copyhold and customary freehold estates of which the deceased owner died tenant on the Court Rolls, and does not affect the devolution of equitable interests in such estates, which will now devolve in the same way as other equitable interests in accordance with the first sub-section (*g*). In the words of KEKEWICH, J., in *Re Somerville and Turner's Contract* (*h*): "There is very good reason for the exception. Where land descends to the heir according to the custom, it is not convenient to interfere with the relation of lord of manor and tenant. There is a peculiar relation between them, and to introduce the personal representative in that case would be to introduce a novel incident which it would be difficult to attach to the land."

Incorporeal hereditaments.

It has been seen that in addition to estates and interests in land, the expression "real estate" includes rights and interests incident to or annexed to land, including among the latter, what are usually known as incorporeal hereditaments, such as manors, advowsons,

(*g*) See *ante*, p. 79.

(*h*) [1903] 2 Ch. 583, at p. 589.

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tithes, easements, profits *à prendre*, rentcharges and fee farm and other rents and franchises and offices annexed to lands and other rights. Incorporeal hereditaments are expressly included in real estate affected by Lord Romilly's Act (*i*), and if vested at the owner's death for an estate of sufficient duration, will undoubtedly devolve under the present Act upon his personal representative. An hereditary title of honour, although an incorporeal hereditament (*k*), and falling within the category of real estate (*l*), is entailed by letters patent. It is neither alienable by the holder during his lifetime nor disposable by his will (*m*), and is not, therefore, real estate within the meaning of the Act.

Titles of honour.

Rents and profits of real estate—Fixtures.

The rents and profits of real estate have been held to be "part of the real estate" within the meaning of Sir John Romilly's Act (*n*), and, together with those chattels which have been said to be "so annexed to and consolidated with the inheritance that they shall accompany it wherever it vests" (*o*) would also seem to be included in the present Act.

Management of landed estates—Whether affected by the Act of 1897.

As regards landed estates, it was at one time feared that in many cases the result of the Act might be to cause interruption in the continuity of the management (*p*) of the estate upon the owner's death. There appears, however, to have been little ground for alarm on this score. The provisions of s. 3 of the Act for

(*i*) 3 & 4 Will. 4, c. 104.

(*k*) *Re Rivett Carnac*, 30 Ch. D. 136.

(*l*) 1 Inst. 20 a. See *Gerard* v. *Gerard*, 5 Mod. 64.

(*m*) H. L. Journ., vol. iv., p. 150. So, in case of an entailed peerage, the pedigree may be deduced through an attainted person. See *Dowtie's Case*, 3 Rep. 10; Co. Lit. 747.

(*n*) *Re Illidge, Davidson* v. *Illidge*, 27 Ch. D. 478 [C. A.].

(*o*) See *post*, p. 109.

(*p*) See further as to management, *post*, pp. 160 *et seq.*

transfer from the personal representative of real estate devolving upon him under the Act to the heir or devisee seem to have been amply sufficient to meet the case of real estate not being required for the payment of debts. On the other hand, where recourse to the real estate is necessary, the effect of providing that real estate shall devolve as a chattel real, *notwithstanding any testamentary disposition*, has no doubt tended greatly to facilitate the administration of landed estates.

CHAPTER V.

OF THE NATURE OF THE ESTATE OF THE PERSONAL REPRESENTATIVE.

SECTION I.

Of the Interest of the Personal Representative in the Property of the Deceased.

The estate of a personal representative is in right of the deceased.

With regard to personal estate, it has been laid down that the interest which an executor or administrator has in the goods of the deceased person is very different from the absolute, proper, and ordinary interest which everyone has in his own proper goods (*a*); for an executor or administrator has his estate as such in another right merely, viz., as the minister or dispenser of the goods of the dead (*b*).

According to the Touchstone (*c*), whatever estate an executor has by his executorship is in him to the use of the testator and in his right; and whatever an executor does in the disposition of that estate is done in the right and to the use of the testator also. An administrator, after he has obtained a grant of administration, has an interest in the property of the deceased equal to that of an executor (*d*).

Personal representative is trustee for the special

The precise interest of a personal representative is only to be gauged by reference to the powers, rights, duties, and liabilities attaching to his office. The law

(*a*) Wentw. Off. Ex. (14th ed.), p. 192.
(*b*) *Pinchon's Case*, 9 Rep. 88 b.
(*c*) Shep. Touch. (ed. Preston), p. 401.
(*d*) Shep. Touch. (ed. Preston), p. 474; *Blackborough* v. *Davis*, 1 P. Wms. 43.

delivers into the hands of the personal representative the goods which were the deceased's in right of action or possession as his own for the purpose of dividing them among creditors, legatees, and next-of-kin (*e*), confers upon him powers and invests him with rights ancillary to this purpose (*f*), and imposes upon him correlative duties and liabilities (*g*). A personal representative, in fact, is a trustee of such property for the special purposes of the trust of administration (*h*), and is so considered in courts of equity (*i*).

purposes of administration.

Thus the powers of disposition of a personal representative, whether voluntary or involuntary, over the property committed to his charge, are confined to such as are necessarily incident to the due performance of the trust of administration (*k*). He cannot by his will bequeath the property for any beneficial interest therein (*l*), nor will his administrator become entitled to administer it upon his death intestate (*m*).

Extent of powers of disposition.

The property is not liable to be taken in execution by the sheriff under a writ of *fieri facias* issued against his own proper goods (*n*), nor does it devolve upon his bankruptcy to the official receiver or trustee in bankruptcy (*o*). Lapse of time and an enjoyment of the property in a manner inconsistent with the trusts of the will, coupled with the consent of the beneficiaries, may, however, raise an inference of a gift of the assets

Involuntary alienation.

(*e*) *Farr* v. *Newman*, 4 T. R. 621; 2 R. R. 479, 484.

(*f*) *Post*, Part II.

(*g*) *Post*, Part IV.

(*h*) *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236; [C. A.]

(*i*) *Farr* v. *Newman*, *supra*; *Re Marsden*, *Bowden* v. *Layland*, 26 Ch. D. 783; 56 & 57 Vict. c. 53, s. 50.

(*k*) *Farr* v. *Newman*, *supra*. See 46 & 47 Vict. c. 52, s. 44.

(*l*) Wentw. Off. Ex. (14th ed.), 193.

(*m*) Shep. Touch. (ed. Preston), p. 465. See *ante*, p. 14.

(*n*) *Farr* v. *Newman*, *supra*; *Re Morgan*, *Pillgrem* v. *Pillgrem*, 18 Ch. D. 93.

(*o*) 46 & 47 Vict. c. 52, s. 44; *Kitchen* v. *Ibbetson*, L. R. 17 Eq. 46, 49.

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by them to the executor, and entitle his judgment creditor to take them in execution. But where the possession, and the time which has elapsed, are in accordance with the trusts of the will, no such inference can arise (*p*).

Formerly a lease with a proviso for forfeiture upon the bankruptcy of the lessee, his executors, administrators, or assigns, was avoided by the bankruptcy of the personal representative, and so lost to the estate (*q*); but relief against such forfeiture may now be obtained under the Conveyancing Acts, 1881 and 1892 (*r*).

Real estate.

With regard to the nature of the estate or interest taken by the personal representative in real estate devolving upon him under the Land Transfer Act, 1897 (*s*), the material provisions of that Act appear to be that such real estate shall "become vested" in the personal representatives or representative of the deceased owner from time to time "as if it were a chattel real vesting in them or him" (*t*), that, save as in the Act provided, it "shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents as if it were personal estate" (*u*), that "the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him" (*x*), and that subject thereto, "the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a

(*p*) *Re Morgan, supra.*
(*q*) *Bridgman* v. *David*, 1 C. M. & R. 405.
(*r*) 44 & 45 Vict. c. 41, s. 14; 55 & 56 Vict. c. 13. s. 2.
(*s*) 60 & 61 Vict. c. 65.
(*t*) Section 1 (1).
(*u*) Section 2 (3).
(*x*) Section 2 (2).

transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate" (*y*).

From these provisions it would appear that all that has been said above with regard to the interest of a personal representative in the personal estate of the deceased, is now applicable *mutatis mutandis* to his interest under the Act in the real estate of a deceased owner.

Estate of representative is in right of deceased.

Thus, in the first place, if the analogy of the personal estate is to be strictly followed, whatever estate the personal representative has in real property by virtue of the Act must be vested in him in right of the deceased, and every disposition by him of that estate must be made also in right of the deceased.

Personal representative trustee of real estate for special purposes of administration.

Secondly, the personal representative must be regarded as having been constituted by the Act a trustee of real estate vested in him by virtue of the Act for the special purposes of the trust of administration imposed by the Act, in the same sense in which, it has been seen, he is a trustee of personal estate devolving upon him by law for the special purposes of the trust of administration by law imposed upon him (*z*). Subject to the trusts of administration which are trusts in favour of creditors, the personal representative is constituted a trustee for the persons beneficially entitled.

Effect of Act upon position of heir and devisee.

As in the case of personal estate, so in the case of real estate, the title of the personal representative cannot be affected by any testamentary disposition on the part of the deceased owner. The interests of creditors and the interest of the personal representative in their behalf are made paramount to those of persons

(*y*) Section 2 (1).

(*z*) *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236 [C. A.] See Goodeve's Law of Real Property (5th ed.), p. 125.

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claiming beneficially, either by descent, devise, or otherwise, just as, in the case of personal estate, the interests of the former are paramount to those of the legatees or next-of-kin of the testator or intestate; and the estate to which the heir-at-law or devisee succeeded under the former law in lands descended or devised is thus during the period of administration, that is to say, until assent or conveyance by the personal representative, converted by the Act into a general or inchoate interest, similar to the interest that the next-of-kin or legatee has, during the same period, in the chattels real or leasehold property of the deceased owner (*b*).

Effect of Act upon statutory powers of tenant for life.

It appears to follow that an instrument of assent or conveyance by the personal representative is made a link in the chain of title of the heir-at-law or devisee, and, in the case of settled land, will constitute one of the instruments creating a settlement within the meaning of s. 2 of the Settled Land Act, 1882 (*c*) in every case in which real estate within the purview of the Land Transfer Act, 1897, is settled by will, so that in the latter case the statutory powers of the tenant for life, which formerly became exerciseable by virtue of the will alone, must now be regarded as suspended and incapable of exercise until the executor's assent to the devise has been duly given.

Interest of personal representative in trust and mortgage estates.

No reference has as yet been made to the interest of the personal representative in real and personal estate of which the deceased may have died solely seised or possessed in trust or by way of mortgage. As regards trust estates devolving upon the personal representative (*d*), the interest of the personal representative appears to be identical with that of the deceased trustee (*e*), save where the instrument creating the

(*b*) *Clegg* v. *Fishwick*, 1 Macn. & G. 294; *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236, 242 n. [C. A.].

(*c*) 45 & 46 Vict. c. 38.

(*d*) See *ante*, p. 67.

(*e*) *Cf. Re Cunningham and Frayling*, [1891] 2 Ch. 567.

trust is so worded as to indicate an intention on the part of the settlor to confide the performance of the trusts declared solely to the persons therein named as trustees and the survivors or survivor of them (*f*), in which case the interest of the personal representative is apparently that of a bare trustee (*g*). The position of the personal representative as regards estates vested in the deceased by way of mortgage is not so easily defined. The powers of the deceased mortgagee in respect of his security may or may not be exercisable by his personal representative, according to the terms of the mortgage and the date of the mortgage deed (*h*). The duty of the personal representative in regard to the exercise of such powers as do devolve upon him must depend upon the equities for the time being attaching to the debt for which the mortgage estates are the security.

Personal representatives to be deemed "heirs and assigns."

By s. 30 of the Conveyancing and Law of Property Act, 1881 (*i*), whereby, as has been seen, the devolution of trust and mortgage estates in real property was assimilated to the devolution of chattels real, it is further provided (*k*) that the like powers to dispose and otherwise deal with real estate within the meaning of the section (*l*) "shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a

(*f*) By s. 22 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), it is enacted in the case of trusts created by instruments coming into operation after 1881, that where a power or trust is given to or vested in two or more trustees jointly, then unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

(*g*) See *Christie* v. *Ovington*, 1 Ch. D. 279; *Re Cunningham and Frayling*, *supra*.

(*h*) See *infra*, p. 92.

(*i*) 44 & 45 Vict. c. 41.

(*k*) See the section set out in full, *ante*, p. 67.

(*l*) The Copyhold Act, 1894 (57 & 58 Vict. c. 46), excepts from the operation of the section estates of copyhold tenure to which a deceased trustee or mortgagee has been admitted in his lifetime, *ante*, p. 68.

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chattel real vesting in them or him"; and for the purposes of the same section the personal representatives, for the time being of the deceased, are to be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

The effect of these provisions is that where previously to the year 1882, the trusteeship, in the case of trust estates, and in the case of mortgage estates, the right to exercise the powers conferred by the mortgage, would have devolved upon the heir or devisee, the same will now devolve in all cases to which the Act applies upon the personal representative.

Former rule as to devolution of trusteeship upon heir or devisee.

Where, formerly, "heirs" were not specified in an instrument creating a trust of real estate, the heir of the survivor upon whom the trust estate descended could not have executed the trust. "The testator (the settlor in the case referred to) may select the heir to succeed to the trust, but he only can do so" (*m*). So, again where "assigns" were not specified in the instrument of trust, the trusteeship could not apparently have devolved with the trust estate upon a devisee of trust estates named in the will of the deceased trustee (*n*). Where, however, the performance of the trusts declared was confided to the trustees named and their heirs, or the heir of the survivor of them (*o*), or to "the trustees for the time being" (*p*), or where real estate was conveyed to trustees and their heirs upon the trusts declared (*q*), the heir of the

(*m*) *Mortimer* v. *Ireland*, 11 Jur. 721. See *Re Morton and Hallett*, 15 Ch. D. 143.

(*n*) *Cook* v. *Crawford*, 13 Sim. 91; *Re Morton and Hallett*, *supra*; where BAGGALLAY and JAMES, L.JJ., refused to consider the decision in the earlier case overruled as stated by JESSEL, M.R., in *Osborne* v. *Rowlett*, 13 Ch. D. 774.

(*o*) *Re Burtt*, 1 Drew, 319; *Re Cunningham and Frayling*, [1891] 2 Ch. 567.

(*p*) *Re Morton and Hallett*, *supra*; *Re Cunningham and Frayling*, *supra*.

(*q*) *Re Morton and Hallett*, *supra*, at p. 149.

survivor has been held competent in each case to execute the trusts. In such latter cases and also in any case where "assigns" are expressly mentioned, the personal representative upon whom the estate devolves will at the present day be the proper person to carry into execution the trusts of the settlement (*r*).

Right of personal representative to refuse to act as trustee

As has been seen, a personal representative, upon whom the estate of the deceased has devolved by will, may rid himself of both the estate and the administration thereof by renouncing probate, but if he accept probate he cannot afterwards refuse to administer any part of the estate (*s*). He may, however, decline to act in the execution of the trusts of real or personal estate held by the deceased as trustee (*t*), and may require new trustees of any such trust estate to be appointed by the Court (*u*). The personal representative is also empowered, in the absence of any intention to the contrary expressed in the instrument creating the trust, to appoint new trustees in place of the deceased sole trustee, and vest the trust property in the persons so appointed (*x*). In this case, however, by taking upon himself the responsibility of appointing, he is deemed to have accepted the trusts and to have rendered himself liable as trustee in the case of an improper appointment (*y*). He cannot be compelled to exercise the power of appointing new trustees (*z*).

Right of personal representa-

The personal representative of a sole mortgagee or of the survivor of several mortgagees (*a*), as a person

(*r*) See *Re Ingleby and the Norwich Union Co.*, 13 L. R. Ir. 326.

(*s*) See *ante*, p. 23.

(*t*) *Legg* v. *Mackrell*, 2 De G. F. & J. 551; *Re Ridley*, *Ridley* v. *Ridley*, [1904] 2 Ch. 774; *Re Bennett*, *Ward* v. *Bennett*, [1906], 1 Ch. 216, 225.

(*u*) *Re Sarah Knight's Will*, 26 Ch. D. 82.

(*x*) Trustee Act, 1893 (51 & 52 Vict. c. 59), s. 10.

(*y*) *Urch* v. *Walker*, 3 My. & C. 702; *Crewe* v. *Dickin*, 4 Ves. 97.

(*z*) *Re Sarah Knight's Will*, *supra*.

(*a*) As to the right of the survivor of several mortgagees to exercise the powers conferred by the mortgage deed for the purposes of the security,

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tive to exercise power of deceased mortgagee.

deriving title under the original mortgagee (*b*), and as the person for the time being entitled to receive and give a discharge for the mortgage money (*c*), may exercise the power of sale and other powers conferred upon mortgagees by the Conveyancing and Law of Property Act, 1881 (*d*), where the mortgage is by deed executed after the commencement of that Act. Where, prior to that date, the instrument of mortgage made no reference to "assigns," the powers conferred upon the mortgagee were not exercisable by a transferee of the mortgage (*e*), unless it were shown with sufficient clearness from the rest of the deed that it was intended that the powers should be transferable. Where, therefore, such an intention is expressed or is apparent from the rest of the deed, or where, in the case of real estate, the heirs, and in the case of personal estate, the executors of the mortgagee are expressly mentioned, but not otherwise, the personal representative upon whom the mortgage estates devolve will now be the proper person to exercise any express powers contained in the mortgage deed.

SECTION II.

OF THE POSSESSION OF THE PERSONAL REPRESENTATIVE.

In view of the many liabilities which the law regards as inseparably connected with the legal ownership or possession of property, as evidenced by some act of ownership or the actual taking of possession of the property, it becomes important to consider under

see *Hind* v. *Poole*, 1 Kay & J. 383. See also s. 61 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which supplies the joint account clause in the case of mortgages made after 1881.

(*b*) 44 & 45 Vict. c. 41, s. 2 (vi).

(*c*) *Ib.*, s. 21 (4). (*d*) *Ib.*, s. 19.

(*e*) *Bradford* v. *Belfield*, 2 Sim. 264 ; *Re Rumney and Smith*, [1897] 2 Ch. 351.

what circumstances the ownership or possession of property, of or to which a deceased person may have died possessed or entitled, will be regarded as having been acquired by his personal representative.

Right of control distinguished from legal ownership or possession.

In reference to the immediate right of control exercisable by the personal representative over the property of a deceased person, it has already been stated, as a general rule, that the property of the deceased vests in his personal representative from the moment of the death or grant of letters of administration, according as the deceased died testate or intestate (*f*). But, except in the case of movable chattels, a distinction is apparently to be drawn between the right of control emanating from the right to possession by law devolving upon the personal representative in his capacity as such, and the legal ownership or possession which he may acquire in the property of the deceased owner by the exercise of some act of ownership over the property or by the actual taking possession thereof.

Movable chattels.

As regards movable chattels, the rule is laid down that "All movable goods, though in ever so many different and distant places, from the executor, shall be in possession of the executor presently upon testator's death" (*g*). In other words, upon the vesting by virtue of the will or letters of administration of movable personal estate in the personal representative, the possession vests in him by operation of law and without the necessity of his taking actual possession (*h*). Such possession carries with it the legal incidents of ownership (*i*).

(*f*) *Ante*, pp. 28, 49.

(*g*) 11 Vin. Abr. 240. See Wentw. Off. Ex. (14th ed.), pp. 228, 229.

(*h*) *Smith* v. *Milles*, 1 T. R. 475, 480. See Pollock and Wright on Possession, p. 127.

(*i*) *Jenkins* v. *Plombe*, 6 Mod. 181. See Wentw. Off. Ex. (14th ed.), p. 229; Toller (7th ed.), p. 153.

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Shares.

With regard to shares in a company registered under the Companies Acts, of which a person may die possessed, the right to control the shares, in a representative capacity, will, of course, vest in his personal representative (*k*). But the interest of the personal representative is not that of the deceased shareholder; he does not by mere operation of law become the possessor or legal owner of the shares, and is consequently free from any personal liabilities which attach exclusively to the legal ownership (*l*). Having the right to control the shares, the personal representative may, of course, have them transferred into his own name, and take upon himself the legal ownership. In that case, he will become to all intents and purposes a partner in the company (*m*); but by merely intimating to the company his title, as personal representative, to the shares, in order to claim and exercise the rights which belong to him as legal personal representative, he does not render himself personally liable to be placed on the list of contributories to the company (*n*).

Chattels real.

So, again, in the case of leaseholds; the interest which the personal representative has by virtue of the will or letters of administration only, is not that of the deceased lessee. He does not *ipso facto* upon the death of the testator or upon taking out letters of admistration, as the case may be, become legal assignee of the lease (*o*); but he is entitled merely in his representative capacity.

Entry by representative.

In order to render himself legal owner of the lease and personally liable as such to the performance of the

(*k*) See *post*, p. 153.

(*l*) *City of Glasgow Bank, Buchan's Case*, 4 App. Cas. 547.

(*m*) *Ib.*, at p. 588.

(*n*) *Ib.*, at p. 595. *Duff's Executors' Case*, 32 Ch. D. 301, 309 [C. A.].

(*o*) 11 Vin. Abr. 240; Wentw. Off. Ex. (14th ed.), p. 228.

covenants contained in it, the personal representative must enter and take possession (*p*).

In the case of *Rendall* v. *Andreae* (*q*), in which it was sought to render the personal representative of a deceased lessee personally liable as assignee upon the covenants contained in the lease, although he had expressly refrained from entering into possession of the property, the law upon the subject was stated by A. L. SMITH, L.J., to be as follows:

"Before entry and taking possession, the executor of a lessee cannot be made liable as assignee of the term, but if he does enter and take possession, he may be made liable as assignee; yet he may then by proper pleading limit his liability for rent to the yearly value the premises might have yielded, though it would seem he cannot so limit his liability in respect of breach of covenant to repair."

Rectory consisting of land and tithes.

It has been doubted whether, in the case of a lease of a rectory consisting of glebe land and tithes for years (and comprising, therefore, both corporeal and incorporeal property), there can be actual possession without actual entry into the glebe land; "but if the lease for years were of tithes, the executor, though in never so remote a place, shall be instantly upon the setting out thereof, in actual possession of them, so as he may maintain action of trespass against any stranger which shall take the tithes set out" (*r*).

Liability of personal representative before entry.

The personal liability of the personal representative as assignee of a term may usefully be compared with, and must be distinguished from, his liability as representative of the deceased lessee. As is more fully

(*p*) *Hopwood* v. *Whaley*, 6 C. B. 744; *Re Bowes, Strathmore* v. *Vane*, 37 Ch. D. 128, 131; *Rendall* v. *Andreae*, 61 L. J. Q. B. 630.

(*q*) 61 L. J. Q. B. 630, 634.

(*r*) Wentw. Off. Ex. (14th ed.), p. 229.

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explained in a later chapter (*s*), the personal representative is liable in his representative capacity upon the contracts of the deceased to the extent of the assets come to his hands; the liability, that is to say, is *de bonis testatoris* and cannot become *de bonis propriis* until action has been brought and judgment recovered thereon. The covenants of an original lessee entered into with his lessor upon the grant of the lease remain enforceable at law against the lessee, and therefore against his personal representative, during the continuance of the term notwithstanding assignment (*t*). The personal representative may, nevertheless, on sale of the term in a due course of administration, take advantage of the protection afforded by Lord St. Leonard's Act (*u*) against any contingent claims in respect of such covenants, and, upon transfer by assent or assignment to the persons beneficially entitled may be fully protected by an order of the Court for administration (*x*) if no sufficient indemnity is forthcoming.

Liability of personal representative after entry.

The liability to which a personal representative becomes subject upon entry into possession as assignee of leaseholds belonging to the deceased is, on the other hand, a personal liability *de bonis propriis*, arising out of privity of estate by virtue of which such of the covenants of the lease as relate to the demised premises become mutually binding between the lessor and the personal representative. This liability extends only to claims in respect of covenants broken during the time that the personal representative remains in possession as assignee (*y*). It is not a contingent liability, nor does it extend to breaches of covenant in respect

(*s*) Chap. XVIII. (*t*) *Brett* v. *Cumberland*, Cro. Jac. 521.

(*u*) 22 & 23 Vict. c. 35, s. 27. *Post*, p. 228.

(*x*) *Dodson* v. *Sammell*, 1 Drew. & Sm. 577. See *Re Nixon, Gray* v. *Bell*, [1904] 1 Ch. 638; *Re King, Mellor* v. *South Australian, etc. Co.*, [1907] 1 Ch. 72.

(*y*) *Pitcher* v. *Tovey*, 1 Salk. 81; *Moule* v. *Garrett*, 5 Ex. 132.

of leases assigned by the deceased lessee in his lifetime (*z*). It is, however, a liability to which the personal representative will remain subject notwithstanding that the deceased's estate is being administered by the Court. As regards the covenant for payment of rent, the personal representative is in a measure protected by the rule of Court already mentioned, but as regards other covenants relating to the demised premises, as, for instance, the covenant to repair, the personal liability of the personal representative appears to be co-extensive with that of any other assignee (*a*).

Dilapidated leaseholds.

It has been suggested that in the present state of the law, the position of a personal representative may be seriously imperilled where he has accepted probate and afterwards discovers that the estate of the deceased consists to a large extent of dilapidated leaseholds. It should be remembered, however, that the usual covenant to repair is not broken until notice given (*b*), so that should the personal representative decide to enter into possession, the extent of his personal liability will be ascertained, or at any rate ascertainable, before he parts with it. If the leasehold premises are of no real value, or being of some value there is an insufficiency of assets to meet the cost of repairs, the personal representative, although he cannot of course waive the term after accepting probate (*c*), will be well advised to refrain from committing any act which may be construed into taking possession of the premises (*d*).

Constructive entry.

The entry and taking possession by the personal representative, necessary to constitute him legal owner of the term, may be constructive only. Thus, payment

(*z*) *Re Nixon, Gray* v. *Bell*, [1904] 1 Ch. 638.
(*a*) *Tremiere* v. *Morison*, 1 Bing. N. C. 99; *Rendall* v. *Andreae*, 61 L. J. Q. B. 630.
(*b*) *Torrens* v. *Walker*, [1906] 2 Ch. 166.
(*c*) *Rubery* v. *Stevens*, 4 B. & Ad. 241, 244.
(*d*) *Cf. Rendall* v. *Andreae*, *supra*.

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of rent by him will afford evidence, in the absence of any special circumstance tending to the contrary, from which entry and taking possession may be inferred (*e*). But merely taking out probate of the will does not amount to constructive entry (*f*).

Real estate.

With regard to real estate of a deceased owner, to which the Land Transfer Act, 1897 (*g*), applies, it is expressly provided by s. 1 (1) of that Act, that it shall—

> ". . . devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him."

The marginal note to this section is "Devolution of legal interest in real estate on death," and the effect of the section, strictly construed, appears to be that as regards real estate to which the Act applies, the personal representative will, by operation of law, become entitled only to an immediate right of control or right to possession in his representative capacity, though with full power of disposition for purposes of administration to the exclusion of the heir or devisee.

As applied to estates of freehold, "to vest" signifies the acquisition of a portion of the actual ownership or feudal possession technically described as seisin (*h*). The section is dealing, therefore, with seisin—that seisin, nevertheless, which, upon the death of a person seised of an estate of inheritance in real property, vested at common law in the heir, namely, a seisin in law which by entry into possession may be converted into a seisin in deed (*i*).

Entry by personal representative.

The duties cast upon the personal representative in respect of real estate by reference to his duties in respect of chattels real do not include any duty or

(*e*) *Rendall* v. *Andreae*, *supra*.
(*f*) *Ibid.*
(*g*) 60 & 61 Vict. c. 65.
(*h*) See *ante*, p. 75.
(*i*) *Ante*, p. 59.

obligation on his part to enter into possession of real property. If, however, he should enter and take possession, either actually or constructively, by receipt of the rents and profits or otherwise, he will no doubt become subject to those liabilities which are incident to the legal ownership of real property, among which may be mentioned the liability of an owner for damage caused to neighbouring property by negligent management, liability for breach of restrictive covenants, and, in the case of a lease granted by the deceased owner containing a covenant by the lessor and his heirs, etc., to keep the premises in repair during the term, liability under the covenant to repair (*k*). It may be added that the Act of 1897 clearly contemplates the possibility of personal liability being incurred by the personal representative in respect of real estate, inasmuch as by s. 3 (1) it is provided that upon assent or conveyance "subject to a charge for all monies (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, *except as to any acts done or contracts entered into by them* before such assent or conveyance."

(*k*) *Cf. Tremiere* v. *Morison*, 1 Bing. (N.S.) 89.

CHAPTER VI.

OF ASSETS FOR THE PAYMENT OF DEBTS.

SECTION I.

Of the Essential Qualities of Assets.

Meaning of assets.

By "assets" for the payment of debts is meant so much of the property of a deceased owner as, in the hands of his personal representative, heir, or devisee named in his will, is liable upon his death for the payment of debts contracted by him during his lifetime. The word "assets" is derived from the French word "assez," enough, there being no liability on the part of the deceased's representatives to pay his debts unless property of the deceased, applicable and "sufficient" for that purpose, has devolved upon them (*a*).

Goods and chattels the only general assets at common law.

The goods and chattels of a deceased debtor were recognised as assets by the Legislature as early as the reign of Edward I. The Statute of Westminster II., passed in that reign, contains a provision (*b*), said to be declaratory only of the common law as it then stood (*c*), that "the ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament"; and although, by the common law, freehold estates of inheritance in land which descended to the heir were available as assets to a favoured class of

(*a*) Godolph. (3rd ed.), p. 180.
(*b*) 13 Ed. 1, c. 19.
(*c*) 1 Inst. 397.

creditors, yet goods and chattels remained, for a long time after the passing of the above statute, the only fund available to the general body of creditors for the payment of their debts.

All kinds of property now assets.

The hardships entailed upon creditors by this state of the law, though gradually lessened as the jurisdiction of the Court of Chancery in all matters relating to trusts became established, remained a just cause of complaint until the interference of the Legislature in comparatively recent times. At the present day, as the result of the several enactments known as the Statutes of Fraudulent Devises (*d*), all property real or personal to which a person is entitled at his death, in his own right, which is of money value and transmissible, and does not stand limited to him for an interest determinable upon his death, is assets for the payment of any debts contracted by him during his lifetime.

Property possessed by the deceased in right of another.

Property claimed as assets must have belonged to the deceased in right of action or possession as his own (*e*). Thus, if a corporation aggregate, as dean and chapter, mayor or commonalty, and the like, have any goods or chattels in right of their corporation, and any of the heads or members thereof die, the executors or administrators of such person shall not have them, but they shall continue in succession with the corporation (*f*).

Property possessed by deceased as executor.

So property held by the deceased as executor (*g*), or as trustee (*h*) for other persons, although devolving on

(*d*) See *post*, pp. 131 *et seq.*

(*e*) Shep. Touch. (ed. Preston), p. 496; Godolph. (3rd ed.), p. 180.

(*f*) Shep. Touch. (ed. Preston), p. 473.

(*g*) Godolph. (3rd ed.), p. 184.

(*h*) Shep. Touch. (ed. Preston), p. 498; Godolph., p. 186; *Deering* v. *Torrington*, 1 Salk. 79.

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his executor or administrator (*i*), is not, of course, assets for the payment of his debts.

As mortgagee (*i*).

Similarly, property held by the deceased as mortgagee is held as security only, and is not as such liable to the debts of the deceased. Generally speaking, however, the rights which the deceased enjoyed as incident to the security vest in his executor or administrator, and all property coming to his hands as the result of the exercise of those rights will be assets in lieu of the debt secured and of the same nature (*k*).

Animals *feræ naturæ*.

Animals *feræ naturæ*, unless tamed or kept in confinement, are not the subject of property (*l*) and cannot, therefore, be assets.

Property of no money value.

Again, property of the deceased of no money value, and which is incapable of being applied towards the payment of his debts, is not, of course, assets (*m*).

Thus, titles of dignity and seignories of homage or fealty are not of money value, and are not assets (*n*).

So, the right of presentation to a church, when an avoidance has taken place, not being saleable on grounds of public policy, is not assets (*o*).

Property held by deceased for an interest determinable upon his death.

Finally, property held by the deceased for an estate of interest determinable *ipso facto* upon his death is not assets.

Thus, the interest of a husband at common law in the real estate of his wife, though an estate of inheritance (*p*), is determined by his death in the lifetime

(*i*) 44 & 45 Vict. c. 41, s. 30. See as to the devolution of trust and mortgage estates, *ante*, p. 67; and as to the position of the personal representative as regards the exercise of trusts and powers declared in respect thereof, *ante*, p. 88.

(*k*) See *post*, p. 117.

(*l*) 2 Bla. Com. (10th ed.), p. 390; Wentw. Off. Ex. (14th ed.), p. 143; Toller (7th ed.), p. 146.

(*m*) Godolph. (3rd ed.), p. 180. (*n*) *Ibid.*, p. 185.

(*o*) Shep. Touch. (ed. Preston), p. 496; Co. Lit. 388 a.

(*p*) Co. Lit. 66 b.

of his wife, and is not available as assets for the payment of his debts (*q*). So also the interest of one of several joint tenants survives to the other or others, and is not assets (*r*).

The interest of a tenant in tail, as such, is neither transmissible nor devisable, but in the eye of the law is regarded as a life interest only (*s*), and is, therefore, not generally assets for the payment of his debts (*t*). The lands of a tenant in tail are, however, made assets for the payment of Crown debts (*u*); and a judgment debt charged by virtue of s. 13 of the statute 1 & 2 Vict. c. 110, and amending Acts (*x*) upon the lands of a tenant in tail, is enforceable against those lands in the hands of any person whose estate the deceased tenant might have barred without the assent of any other person (*y*).

And, generally, such things as are personal, as offices of trust, wardship, or the like, shall not go to the executor or administrator after the death of him that hath them (*z*).

Necessity for classification of assets.

Although it thus appears that almost every conceivable kind of property is now applicable towards the payment of the debts of a deceased owner, yet the creditor's remedy in respect of such real estate as owes its liability as assets to the original jurisdiction of the Court of Chancery or to express enactment extending the jurisdiction of that Court is not the remedy which he formerly had, and still has, in respect of goods and chattels. The rules of administration governing the application of the earlier and later assets respectively

(*q*) See Williams' R. P. (20th ed.), p. 301.
(*r*) Co. Lit. 181 a.
(*s*) See *ante*, pp. 65, 73.
(*t*) 1 Com. Dig. (5th ed.), tit. Assets (B.), 682.
(*u*) 33 Hen. 8, c. 39, s. 52.
(*x*) 27 & 28 Vict. c. 112; 51 & 52 Vict. c. 51.
(*y*) *Re Anthony, Anthony* v. *Anthony*, [1893] 3 Ch. 498.
(*z*) Shep. Touch. (ed. Preston), p. 469.

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in payment of debts are therefore not yet uniform; and an exhaustive classification of assets is still necessary for the purpose of ascertaining what are the rights of creditors and what the corresponding liabilities of the personal representative in respect of the several items of property of which the estate of a deceased person may be composed.

SECTION II.

LEGAL AND EQUITABLE ASSETS.

Importance of distinction.

Although the administration of the estates of deceased persons has long been within the exclusive jurisdiction of the Court of Chancery, and was by the Judicature Act (*a*) assigned to the Chancery Division of the High Court of Justice, the Court of Chancery, in administering such estates, always took cognizance of such legal rights as a creditor might have in respect of any portion of the assets to be administered, and, at the present day, the Court, in administering the estate of a deceased person, will still have regard to any legal right of retainer which may be exerciseable by the personal representative (*b*).

It has been said (*c*) that the importance of the distinction between legal and equitable assets has been greatly diminished since the passing of Hinde Palmer's Act (*d*) and of s. 10 of the Judicature Act, 1875 (*e*). The former Act, it is true, abolishes the distinction between specialty and simple contract debts, making them debts of equal degree for all purposes (*f*); but it

(*a*) 36 & 37 Vict. c. 66, s. 34.

(*b*) *Re Baker, Nichols* v. *Baker*, 44 Ch. D. 262, 270, 272 [C. A.] As to whether the legal right to priority of a creditor who has recovered judgment against the personal representative is now recognised in the administration by the Court of an insolvent estate, see *post*, pp. 279, 280.

(*c*) Wms. Ex. (10th ed.), p. 1299.

(*d*) 32 & 33 Vict. c. 46.

(*e*) 38 & 39 Vict. c. 77.

(*f*) See *post*, p. 201.

can scarcely be said that this provision has to any great extent lessened the importance of the distinction between legal and equitable assets, inasmuch as although its effect, on the one hand, has been to put specialty and simple contract creditors upon an equal footing as regards right to priority, this itself has the result, on the other hand, of largely extending the personal representative's rights of preference and retainer and the simple contract creditor's right of obtaining preference by recovering judgment against the personal representative (*g*). As regards the effect of s. 10 of the Judicature Act, 1875, it has already been observed that in the administration of the estates of deceased persons the Court will still give effect to the personal representative's legal right of retainer. It may further be observed that in the course of the administration of an insolvent estate by the personal representative before the protection of an administration order has been obtained, it is still important, for reasons which will be explained later (*h*), that he should have regard to the rules of the common law in the disposal of legal assets (*i*).

Legal assets.

Legal assets are such as can be reached by a creditor at common law by means of a common law action of debt against the personal representative, under judgment in which the latter may be rendered personally liable to the extent of the assets come to his hands. By proper pleading, that is to say, the personal representative may limit his iability to that extent, but if he allow judgment to be entered for the full amount claimed this will constitute an admission of assets, and he will become personally liable for the full amount. Out of assets come to the hands of the personal

(*g*) See *post*, pp. 202, 205, 208.

(*h*) *Post*, p. 193.

(*i*) The effect of the Land Transfer Act, 1897, upon the distinction between legal and equitable assets is discussed *post*, pp. 143 *et seq.*

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representative the creditor claims payment as of right, and could never have been deprived of his right by any provision contained in the will of the deceased debtor (*k*).

Legal real assets.

Similarly, legal real assets were such as could have been reached by a creditor at common law by means of a common law action against the heir, or, later, against the devisee (*l*).

Equitable assets.

Equitable assets, on the other hand, consisted originally of such property only as Courts of Equity from time to time recognised as impressed with a trust for the payment of debts, and are such as can only be made available for payment of debts by means of a decree or order of a Court of Equity in a suit instituted by a creditor for that purpose. Out of such assets the creditor could not originally claim payment as of right; he claimed rather as a recipient of the testator's bounty. Indeed, it was open to a testator altogether to withdraw from the payment of debts any part of his property which would not, upon his death, constitute legal assets. Hence it is found that the rule of *pari passu* distribution adopted by the Court in the administration of equitable assets is merely the result of the Court's endeavour to enforce the trust for payment of debts according to the implied intention of the testator; and this rule has remained firmly established, although the testator is no longer able to withdraw any part of his property from liability for the payment of debts (*m*).

Cook v. *Gregson.*

The distinction between legal and equitable assets is clearly stated by KINDERSLEY, V.-C., in *Cook* v. *Gregson* (*n*) as follows: "The general proposition is

(*k*) *Davies* v. *Nicolson*, 2 De G. & J. 693, 701.

(*l*) See the effect of the vesting of real estate upon the personal representative, under the Land Transfer Act, 1897, upon this action, *post*, pp. 123, 124.

(*m*) See *post*, p. 220.

(*n*) 3 Drew, 547. See also *Shee* v. *French*, 3 Drew, 716.

clear enough, that when assets may be made available in a Court of Law, they are legal assets; and when they can only be made available through a Court of Equity, they are equitable assets. This proposition does not, however, refer to the question whether the assets can be recovered by the executor in a Court of Law or in a Court of Equity. The distinction refers to the remedies of the creditor, and not to the nature of the property. The question is not whether the testator's interest was legal or equitable, but whether a creditor of the testator, seeking to get paid out of such assets, can obtain payment thereout from a Court of Law, or can only obtain it through a Court of Equity." ". . . If a creditor brings an action at law against the executor, and the executor pleads *plene administravit*, the truth of the plea must be tried by ascertaining what assets the executor has received, and whatever assets the Court of Law, in trying that question, would charge the executor with, must be regarded as legal assets; all others would be equitable assets."

Test formerly applied.

A creditor could obtain payment at common law out of all property which came to the hands of the executor by virtue of his office merely. Hence the test hitherto applied in determining whether assets in the hands of the personal representative were legal or equitable, was whether or not they were such property as vested in the personal representative *virtute officii* (*o*).

The present application of this test is discussed later (*p*).

From what has been said, it will be seen that the nature or character of assets depends upon the nature of the jurisdiction exercised by the Court, by which originally they were administered, and at the present

(*o*) *Cook* v. *Gregson*, 3 Drew, 547; *Shee* v. *French*, *supra*.
(*p*) *Post*, pp. 144 *et seq.*

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day is to be ascertained, therefore, by reference to the source from which they derive their liability for payment of debts. Hence the classification adopted in the following pages.

SECTION III.

ASSETS AT COMMON LAW—PERSONALTY.

Description of legal personal assets.

"All those goods and chattels, actions and commodities which were the deceased's in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in the right of his executorship and administration, and all such things as do come to the executor and administrator in lieu or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee" (*q*).

Assets of the above nature, called assets *enter mains* from the fact that they come to the hands of the executor or administrator as such, are legal assets at common law (*r*); and may be considered under four distinct heads embracing the following items or kinds of property.

(*A.*) *Chattels personal owned by the deceased in possession.*

Movable chattels.

The general rule is that all movable chattels devolve by the common law upon the personal representative of the deceased owner (*s*), and are thus assets for the payment of his debts. Even the paraphernalia of a

(*q*) Shep. Touch. (ed. Preston), p. 496; Godolph. (3rd ed.), p. 180.
(*r*) Toller (7th ed.), p. 136.
(*s*) Godolph. (3rd ed.), p. 122. See *ante*, p. 28.

widow (her ordinary wearing apparel excepted (*t*)) being strictly the property of her husband during his lifetime (*u*), devolve at his death upon his personal representative as assets for the payment of his debts (*x*), although subject to the widow's right of marshalling hereafter noticed (*y*).

Chattels annexed to inheritance—Fixtures.

Certain chattels, however, are deemed to be so annexed to and so necessary to the wellbeing of the inheritance that they shall accompany the land wherever it vests by either descent or purchase (*z*), such as deer in a park, or fish in a pond (*a*). So, heirlooms were, by ancient custom, vested in the heir (*b*), and by a rule of the common law "whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, '*quod ab ædibus non facile revellitur*,' is become a member of the inheritance, and shall thereupon pass to the heir; as chimney-pieces, pumps, old fixed or dormant tables, benches and the like" (*c*).

As between the heir or devisee on the one hand and the executor on the other, the Court has adhered, save in the case of ornamental fixtures, to the rule of the common law "*quicquid plantatur solo, solo cedit*" (*d*). So long as a chattel was "*solo infixum*" it devolved upon the heir and it was perfectly immaterial whether it was for the purpose of a manufactory or otherwise; and all articles belonging to the *corpus* of machinery

(*t*) 1 Roll. Abr. 911; Shep. Touch. (ed. Preston), p. 469.

(*u*) *Hastings* v. *Douglas*, Cro. Car. 343. See *Tasker* v. *Tasker*, [1895] P. 1.

(*x*) *Tasker* v. *Tasker*, [1895] P. 1; *Ridout* v. *Earl of Plymouth* 2 Atk. 105.

(*y*) See *post*, Cap. XVI.

(*z*) 2 Bla. Com. (10th ed.), p. 428.

(*a*) Co. Lit. 8 a.

(*b*) Co. Lit. 185 b.

(*c*) 2 Bla. Com. (10th ed.), p. 428. See, for a list of such fixtures, Shep. Touch. (ed. Preston), p. 471.

(*d*) *Lawton* v. *Salmon*, 1 H. Bl. 259 n; *Fisher* v. *Dixon*, 12 Cl. & F. 312, 331.

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devolving upon the heir, although more or less capable of being used in a detached state from it, remained attached to the freehold (*e*).

Ornamental fixtures.

The ground of the exception in respect of ornamental fixtures was recently explained in an exhaustive manner in *Re De Falbe, Ward* v. *Taylor* (*f*), in the Court of Appeal, and again in the same case, *sub nom. Leigh* v. *Taylor* (*g*), in the House of Lords. As stated in Goodeve's Law of Real Property (*h*), "it is clear from the judgment and speeches in this case that the nature of the thing fixed and the purpose of its being fixed must be taken into consideration. Where the object and purpose of the annexation of the chattel has been for its more complete enjoyment and use as such, the chattel is removable (*i*), but where the object and purpose has been for the improvement of the freehold, the chattel is irremovable (*k*). The object and purpose of the annexation must be inferred from the circumstances of each case, and the degree of annexation, although material as indicating the intention, is not the only matter which has to be taken into consideration. Regard must be had also to the relation of the parties."

Trade fixtures.

The claim of an executor as against heir or devisee to remove fixtures set up by the deceased owner has always been less favoured than the claim of a tenant for years against his landlord or of an executor of a tenant for life against the remainderman (*l*). As between the remainderman and the executor of a tenant for life or in tail, the common law rule has,

(*e*) *Fisher* v. *Dixon*, *supra*, 326, 328, 330.
(*f*) [1901] 1 Ch. 523. See also *Hill* v. *Bullock*, [1897] 2 Ch. 482.
(*g*) [1902] A. C. 157.
(*h*) 5th ed., at p. 25. (*i*) See *Beck* v. *Rebow*, 1 P. Wms. 94.
(*k*) See *Cave* v. *Cave*, 2 Vern. 508; *Norton* v. *Dashwood*, [1896] 2 Ch. 497.
(*l*) *Norton* v. *Dashwood*, [1896] 2 Ch. 497, 500.

from motives of public policy directed towards the encouragement of trade, been released also in respect of trade fixtures (*m*).

In cases to which the Land Transfer Act, 1897 (*n*), applies, chattels annexed to the freehold as well as movable chattels, will now devolve upon the personal representative of the deceased owner. Chattels thus devolving will, nevertheless, in all respects, partake of the incidents of the land to which they are annexed. As is explained later (*o*), they will thus become equitable assets for the payment of debts, and, subject thereto, must be held in trust for, and ultimately transferred with the land to the persons by law beneficially entitled thereto.

Emblements.

Emblements, being the profits of any annual crop produced by labour and manurance, are by the common law vested upon the death of the occupier of the land in his personal representative (*p*), provided the crops were sown by such occupier and not merely by the person through whom he claimed (*q*).

A devise of land, however, in the absence of any direction to the contrary contained in the will (*r*), carries with it the emblements upon the land, upon the principle that every man's donation shall be taken most strongly against himself (*s*).

Natural products of land.

The natural products of land devolve with the land unless previously severed actually or constructively (*t*). So trees, unless granted to the deceased separately from

(*m*) *Lawton* v. *Lawton*, 3 Atk. 13; *Re De Falbe, Ward* v. *Taylor, supra*, at pp. 530, 535; affirmed, [1902] A. C. 157.

(*n*) 60 & 61 Vict. c. 65.

(*o*) *Post*, p. 135.

(*p*) Co. Lit. 55 a; Wentw. Off. Ex. (14th ed.), pp. 145 *et seq.*

(*q*) See Wms. Ex. (10th ed.), vol. i., p. 537.

(*r*) *West* v. *Moore*, 8 East, 339.

(*s*) *Cooper* v. *Woolfitt*, 2 H. & N. 122; *West* v. *Moore, supra*. See Gilb. Law of Evid. 250.

(*t*) Wentw. Off. Ex. (14th ed.), p. 148; Godolph. (3rd ed.), pp. 122, 123.

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land of inheritance or actually severed in his lifetime, and the fruit hanging thereon, do not come to the personal representative as legal assets at common law (*u*), but devolve upon him, if at all, as equitable assets, with the land upon which they grow.

Such trees as are timber will not generally devolve upon the personal representative of a tenant for life or years impeachable for waste, although severed during his lifetime (*x*).

(*B.*) *Choses in action belonging to the deceased.*

Reduction into possession.

Choses in action are not assets so as to charge the personal representative, until reduced into possession (*y*); but, in order to constitute reduction into possession, it is not necessary that the personal representative shall have actually received the money into his hands; for a release or acquittance or acknowledgment of satisfaction will, in contemplation of law, amount to a receipt (*z*).

It does not affect the nature of the asset when recovered, that the chose in action can only be reduced into possession by the personal representative by means of a suit in equity. The amount recovered will be chargeable against the personal representative in any action of debt at common law brought by a creditor of the deceased debtor, and is, therefore, legal assets (*a*). So, a legacy to which the deceased was entitled, though recoverable by the personal representative only in equity, is nevertheless legal assets when recovered (*b*).

(*u*) *Re Ainslie, Swinburn* v. *Ainslie*, 30 Ch. D. 485 [C. A.].

(*x*) *Bewick* v. *Whitfield*, 3 P. Wms. 267; *Honywood* v. *Honywood*, L. R. 18 Eq. 306; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, 374 [C. A.].

(*y*) Shep. Touch. (ed. Preston), p. 497; 11 Vin. Abr. 239; *Jenkins* v. *Plombe*, 1 Salk. 207.

(*z*) Wentw. Off. Ex. (14th ed.), p. 170; *Cocke* v. *Jennor*, Hob. 66.

(*a*) *Harecourt* v. *Wrenham*, Moore, 858.

(*b*) Williams on Real Assets, p. 6. See *Bassett* v. *Bassett*, 3 Atk. 203, 207; Shep. Touch. (ed. Preston), p. 454.

A chose in action may be defined as a right to recover money or to enforce some legal obligation (*c*). Among choses in action, or chattels which were the deceased's in right of action as his own, must, therefore, be considered, in addition to debts due to the deceased, rights founded either in contract or in tort, such rights for instance as the deceased may have had in the shares of a company of which he was a shareholder, patent rights and copyrights.

Debts.

The executor is entitled at common law to the debts of every description owing to the testator, whether simple contract debts or debts by bond, statute or judgment, or arrearages for rent; and all such debts, when received by the executor, become assets in his hands (*d*).

The statute 31 Edw. 3 (*e*), extends the same right to administrators appointed by the ordinary.

Claims founded in contract or tort.

So, again, all monies recoverable by the personal representative under or by virtue of any contract entered into with the deceased (*f*), or in respect of injury to the property of the deceased (*g*), whether in the nature of damages, penalty, compensation or otherwise, when recovered, are legal assets in his hands.

Damages for injury to the person.

The personal representative had originally no right of action in respect of wrongs done to the property or person of the deceased, for, in respect of such wrongs, the common law maxim *actio personalis moritur cum persona* applied without any qualification (*h*).

(*c*) Goodeve's Law of Real Property (5th ed.), p. 14.

(*d*) Wentw. Off. Ex. (14th ed.), p. 159; Godolph. (3rd ed.), p. 183; Toller (7th ed.), p. 157; Bac. Abr. (7th ed.), tit. Exors., p. 488.

(*e*) S. 1, c. 11.

(*f*) Wentw. Off. Ex. (14th ed.), p. 160; 1 Com. Dig. (5th ed.), p. 457; Bac. Abr. (7th ed.), tit. Exors., p. 488; *Att.-Gen.* v. *Brunning*, 8 H. L. Cas. 243, 264.

(*g*) Godolph. (3rd ed.), p. 181; Bac. Abr. (7th ed.), tit. Exors., p. 488.

(*h*) *Pulling* v. *Great Eastern Rail. Co.*, 9 Q. B. D. 110.

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Damages for injury to property.

But by the statute 4 Edw. 3, c. 7 (*i*), upon the wording of which a literal construction has been placed by the Courts (*k*), the rule has been established that whenever the personal estate of the deceased has been damnified, and the wrong remains unredressed at the time of his death, damages by way of compensation are recoverable by the personal representative (*l*).

The above statute does not extend to injuries done to the freehold of a deceased person (*m*). In respect of such injuries, the only right of the personal representative to claim damages is that prescribed by a later statute (*n*), which enacts that:

> ". . . An action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person . . ." (*o*).

Compensation for death caused by injury.

Damages may also in certain cases be recovered by the personal representative of the deceased in respect of the death of the deceased occasioned by the negligence of other persons (*p*). But damages so recovered are applicable only for the benefit of the deceased's family, and not as general assets.

(*i*) Amended, 25 Edw. 3, S. 5, c. 5.

(*k*) *Wilson* v. *Knubley*, 7 East, 128, 135.

(*l*) Toller (7th ed.), p. 158. See *Twycross* v. *Grant*, 4 C. P. D. 40; *Hatchard* v. *Mège*, 18 Q. B. D. 771; *Oakey and Sons* v. *Dalton*, 35 Ch. D. 700.

(*m*) *Emerson* v. *Emerson*, 1 Vent. 187.

(*n*) 3 & 4 Will. 4, c. 42, s. 2.

(*o*) See *Jones* v. *Simes*, 43 Ch. D. 607, 613.

(*p*) 9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95, s. 1; 43 & 44 Vict. c. 42.

Right of action for breach of contract.

The maxim, *actio personalis moritur cum persona*, has no application to any breaches of contract, except those which constitute a mere personal wrong, and with that exception, all rights of action for breaches of contract pass to the executors (*q*).

Whether or not a breach of contract constitutes a mere personal wrong is sometimes a question of considerable difficulty. Clearly the nature of the breach must depend upon the nature of the contract, and the true criterion of a breach of contract constituting a mere personal wrong appears to be that the contract, the breach of which is alleged, is such that any benefit to be derived thereunder is capable of being dissociated from any increase or accession to the personal estate of the covenantee (*r*). In *Formby* v. *Barker* (*s*) one question before the Court of Appeal was whether an action for breach of a restrictive covenant committed after the death of the vendor was maintainable by his executor, the covenant having been entered into by the purchaser upon the sale to him of the whole of the vendor's property. VAUGHAN WILLIAMS, L.J., was of opinion that the breach of covenant was not one constituting a mere personal wrong. ROMER, L.J., on the other hand, was of opinion that as the restrictive covenant was entered into with the covenantee, not in respect of or concerning any ascertainable property belonging to him or in which he was interested, it must be regarded, so far as the vendor was concerned, as a personal covenant, that is, as one obtained by him for some personal purpose or object, that the benefit of such a covenant could not be assigned, and that no right of action could therefore pass to the personal

(*q*) *Formby* v. *Barker*, [1903] 2 Ch. 539, at p. 548.

(*r*) See *Chamberlain* v. *Williamson*, 2 M. & S., p. 408; *Beckham* v. *Drake*, 2 H. L. Cas. 579.

(*s*) [1903] 2 Ch. 539.

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representative in respect of any breach thereof committed after the death of the covenantee.

Conversion.

Express power to carry into effect the contract of a deceased owner for the sale of real estate was conferred, in cases of death after 1881, upon the personal representative by s. 4 of the Conveyancing and Law of Property Act, 1881 (*t*). Such a contract effects, for purposes of devolution, a conversion of real into personal estate. By the equitable doctrine of conversion, where money is covenanted to be laid out in land, or land is contracted to be sold, upon the principle that, in equity, what ought to be done must be considered as done, the money, in the one case, is considered as land, and the land in the other case is considered as money. In either case the property, after conversion, will devolve in the same manner, and subject to the same incidents as that species of property into which it has been converted (*u*).

Money covenanted to be laid out in land.

Accordingly, money covenanted to be laid out in land, in all cases, previously to the Land Transfer Act, 1897 (*x*), devolved upon the heir-at-law or devisee (*y*), and must at the present day, be dealt with by the personal representative as if it were land.

Land contracted to be sold.

Conversely, where a contract has been entered into by the deceased for the sale of real estate, the interest of the deceased being, under the doctrine of equitable conversion, an equitable interest in the purchase-money, the right to sue upon the contract for the recovery of the purchase-money will devolve upon his personal representative, and the purchase-money when recovered will be legal assets at common law (*z*).

(*t*) 44 & 45 Vict. c. 41.

(*u*) *Fletcher* v. *Ashburner*, 1 Bro. C. C. 497; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 507, 515.

(*x*) 60 & 61 Vict. c. 65.

(*y*) *Edwards* v. *Countess of Warwick*, 2 P. Wms. 171; *In the Goods of Lloyd*, 9 P. D. 65.

(*z*) *Att.-Gen.* v. *Brunning*, 8 H. L. Cas. 243.

Option of purchaser.

The result is the same where the contract is for the sale of real estate at the option of the purchaser; the option, when exercised, is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal estate at a future period (*a*), leaving unaffected the rents accrued due in the interval (*b*).

Mortgaged land

But this doctrine has, as a general rule, no application to the case of mortgages given or taken by the deceased.

The equity of redemption in mortgaged property is recognised as an estate in the land mortgaged (*c*), and the mortgagor as the real owner of the property (*d*). The beneficial interest, therefore, in an equity of redemption will descend in the same manner as the property the subject of the mortgage would have descended if it had remained unmortgaged (*e*).

Mortgage money.

On the other hand, the mortgage debt and the right to sue upon it will devolve as will any other chose in action, upon the personal representative of the mortgagee; and any property recovered by the personal representative as the result of the exercise by him of the rights devolving upon him under the mortgage contract, must be applied as legal assets in the place of the mortgage debt (*f*).

Where, however, the purchaser of an estate afterwards discovered that the property was subject to an

(*a*) *Lawes* v. *Bennett*, 1 Cox. 167; *Edwards* v. *West*, 7 Ch. D. 858; *Re Isaacs, Isaacs* v. *Reginall*, [1894] 3 Ch. 506.

(*b*) *Townley* v. *Bedwell*, 14 Ves. 590.

(*c*) *Casborne* v. *Scarfe*, 1 Atk. 602.

(*d*) *Heath* v. *Pugh*, 6 Q. B. D. 345, 360; *Tarn* v. *Turner*, 39 Ch. D. 456, 460.

(*e*) *Duly* v. *Nalder*, 11 Jur. (N.S.) 921; *Bourne* v. *Bourne*, 2 Hare, 35; *Fawcet* v. *Lowther*, 2 Ves. 300, 304. As to the difference in the devolution of legal and equitable interests in copyholds, see *ante*, pp. 61, 65, 81.

(*f*) *Winn* v. *Littleton*, 1 Vern. 3; *Canning* v. *Hicks*, 1 Vern. 412; *Awdley* v. *Awdley*, 2 Vern. 192; *Tabor* v. *Grover*, 2 Vern. 367; *Re Loveridge, Drayton* v. *Loveridge*, [1902] 2 Ch. 859.

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equity of redemption, it was held that the purchase under the circumstances operated to convert the purchase-money into realty (*g*). So the subsequent entry by the mortgagee into possession (*h*), and *à fortiori* foreclosure by the mortgagee, or the purchase by him of the equity of redemption are sufficient indications of the intention of the mortgagee to convert the mortgage money into realty (*i*).

(*C.*) *Chattels Real belonging to the Deceased.*

All chattels real devolve, by the common law, on the personal representative of the deceased owner (*k*) even though they be expressly limited to him and his heirs (*l*),

Chattels real are such as concern or savour of the realty (*m*), but lack the essential quality of realty, viz., an indeterminate duration.

Option to purchase.

Thus leases for years, whether owned by the deceased in possession or reversion, are legal assets at common law (*n*). So, also, the benefit to be derived from the exercise by the personal representative of any option to purchase, granted to the deceased lessee, and devolving with the leasehold interest, must accrue to the same parties as those for whom the leasehold interest is held (*o*).

Tenancy by elegit, etc.

The interest of a tenant by elegit being determined as soon as the debt for which the land was extended

(*g*) *Cotton* v. *Iles*, 1 Vern. 271.

(*h*) *Awdley* v. *Awdley*, *supra*; *Noys* v. *Mordaunt*, 2 Vern. 581.

(*i*) *Att-Gen.* v. *Vigor*, 8 Ves. 256, 277.

(*k*) 2 Bla. Com. (10th ed.), p. 142; Godolph. (3rd ed.), pp. 120, 121; Shep. Touch. (ed. Preston), p. 470.

(*l*) Co. Lit. 388 a. (*m*) 2 Bla. Com. (10th ed.), p. 386.

(*n*) Wentw. Off. Ex. (14th ed.), pp. 126 n, 189; Godolph. (3rd ed.), p. 182.

(*o*) *Re Adams and the Kensington Vestry*, 27 Ch. D. 394, 402.

is paid, is also a chattel interest (*p*) and legal assets at common law (*q*). Advowsons, tithes, fairs, markets, and the like, which the deceased had only for years, are other examples of this species of property (*r*).

Equitable interests in chattels real.

The circumstance that the interest of the deceased in such property was equitable only does not prevent that interest from vesting by operation of the common law in the personal representative, nor, consequently, it is now established (contrary to the earlier decisions (*s*)), does this circumstance affect the character of the asset in the hands of the personal representative (*t*). So personal property held in trust for the deceased (*u*), or in respect of which the deceased was entitled only to the equity of redemption (*x*) is nevertheless legal assets at common law.

(*D.*) *All property accruing to the personal representative by way of increase from property owned by the deceased, or by way of sale or exchange or otherwise in lieu of property owned by the deceased.*

Trade profits.

Thus "increase gotten to the executors by merchandizing with the testator's goods shall be assets in their hands, and shall charge them" (*y*).

Farm produce.

So increase of sheep or cattle, and the wool growing upon sheep are legal assets at common law (*z*).

(*p*) 2 Bla. Com. (10th ed.), p. 387.

(*q*) Godolph. (3rd ed.), p. 121.

(*r*) *Ibid;* Wentw. Off. Ex. (14th ed.), p. 130.

(*s*) See *Spencer* v. *Cox*, 3 P. Wms. 341; *Hartwell* v. *Chitters*, Amb. 308; *Clay* v. *Willis*, 1 B. & C. 364, 372.

(*t*) See as to the distinction between legal and equitable assets, *ante* pp. 104 *et seq.*

(*u*) *Wilson* v. *Fielding*, 2 Vern. 763; *Mutlow* v. *Mutlow*, 4 De G. & J. 539.

(*x*) *Cook* v. *Gregson*, 3 Drew. 547.

(*y*) Godolph. (3rd ed.), p. 182; *Abbott* v. *Parfitt*, L. R. 6 Q. B. 346. See as to liability of executors carrying on the deceased's business, *Vyse* v. *Foster*, L. R. 8 Ch. A. 309, affirmed L. R. 7 H. L. 318.

(*z*) Wentw. Off. Ex. (14th ed.), p. 190; Godolph. (3rd. ed.), p. 183.

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Property exchanged.

Property received by the personal representative by way of exchange for such as is already assets in his hands, becomes assets of the same nature as the property exchanged; as money for goods or goods for money (*a*).

Renewed lease.

Upon the same principle interests in land, whether of a chattel or freehold nature, may accrue to the personal representative as assets at common law. Thus where the personal representative has renewed a lease, the new lease will be legal assets in his hands (*b*). So a freehold interest accruing by the exercise by the personal representative of an option in a lease granted to the deceased to purchase the freehold has been held to be legal assets (*c*).

Equity of redemption.

Where the absolute interest in freeholds, of which the deceased was mortgagee, becomes vested in the personal representative either by force of the Statute of Limitations, or by the purchase by the personal representative of the equity of redemption, such property would seem to be legal assets at common law (*d*).

SECTION IV.

ASSETS AT COMMON LAW—REALTY.

Assets by descent.

Real estate was not generally extendible at common law for the satisfaction of a man's debts, nor, as of course followed, was it generally liable as assets for the payment of his debts after his decease (*e*). For

(*a*) Wentw. Off. Ex. (14th ed.), p. 125 n. See *Re Evans*, *Evans* v. *Evans*, 34 Ch. D. 597, C. A.

(*b*) *James* v. *Dean*, 11 Ves. 383, 392; *Re Morgan*, *Pillgrem* v. *Pillgrem*, 18 Ch. D. 93, C. A.

(*c*) *Re Adams and the Kensington Vestry*, 27 Ch. D. 394, 412.

(*d*) See *Canning* v. *Hicks*, 1 Vern. 412; *Tabor* v. *Grover*, 2 Vern. 366. See *Re Loveridge*, *Pearce* v. *Marsh*, [1904] 1 Ch. 518.

(*e*) 4 Bac. Abr., tit. Heir and Ancestor (F.), 164.

it was assumed at common law, unless the contrary appeared upon the contract, that a creditor contracted with his debtor in respect only of his personal estate, and did not depend upon the real estate as security for repayment.

Where, however, the ancestor died indebted by deed under seal in which his heirs were expressly bound to payment, the common law recognised the personal liability of the heir to answer the debts of his ancestor to the extent of any freehold estate of inheritance in fee simple descended upon him (*f*).

Real estate so descending, to the extent to which the heir was liable, was therefore called "assets by descent" (*g*), and, it is to be observed, was assets only to a limited extent, viz., for the satisfaction only of that class of creditors who claimed under specialties binding the heir.

Heir when bound.

By the Conveyancing and Law of Property Act, 1881 (*h*), it was provided that a covenant, and a contract under seal, and a bond or obligation under seal, made after December 31st, 1881, though not expressed to bind the heirs, shall, so far as a contrary intention is not expressed therein, and subject to the terms thereof, operate in law to bind the heirs and real estate as if heirs were expressed to be bound therein.

Assets by descent, legal assets.

Assets by descent were legal assets at common law in the sense in which that expression is always used, namely, assets which could be got at by an action at law (*i*); the remedy of the creditor being an action at law against the heir, of debt or covenant according to the nature of the specialty (*k*).

(*f*) *Ibid.* See Co. Lit. 376 b.

(*g*) 2 Bla. Com. (10th ed.), p. 244; Williams on Real Assets, p. 2.

(*h*) 44 & 45 Vict. c. 41, s. 59.

(*i*) *Re Illidge, Davidson* v. *Illidge*, 27 Ch. D. 478, C. A. See *ante*, p. 105.

(*k*) Williams on Real Assets, p. 16.

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What interests in land are assets by descent at common law.

Lands of freehold descending in fee simple could alone be claimed as assets by descent (*l*); and, by the common law, alienation by the heir before action had been brought, relieved him of all liability (*m*).

The common law was from time to time amended by statute in several particulars (*n*), which, having regard to the provisions of the Land Transfer Act, 1897 (*nn*), are probably of less practical than historical importance at the present day.

Statutory amendments of common law.

Thus, by the Statute of Frauds (*o*), equitable estates in fee simple were rendered assets by descent; and by the same statute (*p*) it was provided that an estate *pur autre vie* limited to a man and his heirs should, upon the death of the tenant *pur autre vie*, if allowed to devolve upon the heir as special occupant, become chargeable in his hands as assets by descent.

By the earlier Statutes of Fraudulent Devises (*q*), it was provided that:

> ". . . where any heir-at-law shall be liable to pay the debts . . . of his ancestors, in regard of any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought, or process sued out against him, such heir-at-law shall be answerable for such debt or debts, . . . in an action or actions of debt . . . *to the value* of the said land so by him sold, aliened, or made over."

By the last-mentioned statutes also, devisees were rendered liable, in respect of lands devised to them, to

(*l*) 4 Bac. Abr. (7th ed.), tit. Heir and Ancestor (I.), 175. See Williams on Real Assets, p. 17.

(*m*) 4 Bac. Abr. (7th ed.), tit. Heir and Ancestor (F.), 165; Co. Lit. 102 b.

(*n*) See Williams on Real Assets, pp. 16—22.

(*nn*) 60 & 61 Vict. c. 65.

(*o*) 29 Car. 2, c. 3, s. 10.

(*p*) Section 12. Repealed but re-enacted by the Wills Act (7 Will. 4 & 1 Vict. c. 26, s. 6).

(*q*) 3 Will. & M. c. 14, s. 5; 11 Geo. 4 & 1 Will. 4, c. 47.

answer the debts of their testators; and real estate so devised became legal assets in the same limited sense in which real estate descended was legal assets at common law (*r*).

Effect of Lord Romilly's Act upon assets by descent.

So the law remained up to the time of the passing of the Land Transfer Act, 1897 (*rr*); for, although all real estate (not charged with or devised subject to debts) was by Lord Romilly's Act (*s*), subsequently rendered assets to be administered in equity (*t*) for the satisfaction of all classes of creditors, it has been held that the last-mentioned Act must be construed only as having given additional remedies to creditors, and not as having taken away the right of creditors by specialty in which the heirs were bound, to treat assets, descended or devised, as legal assets in the hands of the heir or devisee for satisfaction of their debts (*u*).

Effect of Land Transfer Act upon assets by descent.

Whether legal assets by descent are still available as such, notwithstanding the provisions for administration of real estate by the personal representative, and the vesting of real estate for that purpose contained in the Land Transfer Act, 1897 (*rr*), whether, that is to say, the heir-at-law or devisee may still be made answerable for debts, to the value of lands descended or devised, through the medium of a common law action on the covenant brought by the specialty creditor, is a question upon which the decision in favour of specialty creditors under Lord Romilly's Act appears to have a material bearing. The additional remedies referred to in *Re Illidge* (*x*) as having been given by the earlier Act to creditors against the heir or devisee may now be enforced against the personal representative; and the estate of the heir or devisee until assent or conveyance by the

(*r*) *Re Illidge, Davidson* v. *Illidge*, 27 Ch. D. 478, 483, C. A.
(*rr*) 60 & 61 Vict. c. 65.
(*s*) 3 & 4 Will. 4, c. 104.
(*t*) *Post*, p. 136.
(*u*) *Re Illidge, Davidson* v. *Illidge, supra.*
(*x*) 27 Ch. D. 478.

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personal representative is converted, during the period of administration, into an inchoate right such as a legatee has in respect of personalty bequeathed to him. So long, therefore, as the real estate remains vested in the personal representative, there appears to be no ground upon which to base an action upon the covenant at common law against the heir or devisee; but after assent or conveyance by the personal representative pursuant to s. 3 of the Land Transfer Act, 1897, either subject to a charge for the payment of any money which the personal representative is liable to pay, or without any such charge, it is by no means clear that the common law remedy of the specialty creditor will not be revived and become enforceable against either heir or devisee in respect of any real estate so conveyed to him. Possibly, indeed, a specialty creditor may be held entitled to bring his action immediately and obtain judgment for his debt, to the extent of "assets by descent," in a form equivalent to a judgment *quando acciderint*. In no case, it is conceived, would the estate which is in the heir pending a grant of administration justify a judgment for immediate payment, for although that estate is a seisin in law (*y*) which was sufficient, prior to the Act, to support an action on the covenant (*z*), it must now be regarded as a trust estate liable to be divested from the heir *ipso facto* upon the grant being made.

Copyhold estates not assets by descent.

Estates of copyhold tenure were never liable as assets by descent to the payment of the debts of their deceased owner. Being held at the will of the lord merely, they were not within the common law rule relating to feehold estates of inheritance (*a*), nor has any common law right of action been conferred by

(*y*) *Ante*, p. 59.

(*z*) Challis, R. P. (2nd ed.), p. 209.

(*a*) 4 Co. Rep. 22 a; 4 Bac. Abr. (7th ed.), tit. Heir and Ancestor (I.), 175.

statute upon creditors against the customary heir or devisee in respect of such estates.

The question whether or no real estate devolving upon the personal representative under the Land Transfer Act, 1897, is to be regarded as legal assets in his hands is reserved for discussion at the conclusion of the present chapter (*b*).

SECTION V.

ASSETS IN EQUITY.

The interference of the Court of Chancery in the administration of the estate of deceased persons was based upon the jurisdiction which that Court, as keeper of the King's conscience, assumed in reference to the enforcement of uses and trusts (*c*).

Lands devised by custom to executor in trust for sale.

The earliest trusts in favour of creditors are to be found in the wills of owners of land devisable by custom. By custom in some particular localities an owner of land, anxious that his debts and obligations of every description should be discharged at his death, might either devise his lands to his executors to be sold for that purpose, giving them an estate in the land (*d*), or might simply direct that his lands should be sold by his executors, giving them a bare authority or trust to sell, unaccompanied by the legal estate in the land which descended to the heir and so continued until divested by the exercise of the power (*e*). The proceeds of any sale of lands effected under either form

Common law power of sale.

(*b*) See *post*, pp. 143 *et seq.*

(*c*) 1 Saund. Uses, 64. See Wright's Tenures, 172, 174 ; Co. Lit. 111 b.

(*d*) Co. Lit. 111 a, 236 a.

(*e*) Co. Lit. 112 b, 113 a. A power thus conferred and taking effect originally by force of the custom operated subsequently when lands became generally devisable, under the Statute of Wills (see Co. Lit. 112 b), and, later, under the Wills Act, but is nevertheless known to the present day as the executor's common law power of sale.

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of disposition would be mixed with other assets in the hands of the executors and distributed by them as legal assets (*f*).

Introduction of uses.

Upon the introduction of uses (*g*), similar dispositions by will might be made of lands not devisable by custom by testators who had previously conveyed their lands to a feoffee to uses. In this case also the proceeds of sale were originally distributable as legal assets, in spite of the fact that the use declared by the will was enforceable only by the aid of the Court of Chancery (*h*). In course of time, however, the rule was formulated that where the remedy of the creditor is in equity the assets recovered are equitable assets, and it is now settled that where an executor has a mere power to sell for the payment of debts, whether that power is given to him expressly or by implication, the proceeds of sale are equitable assets distributable *pari passu* among all creditors equally (*i*).

Trusts and charges for payment of debts.

When, in the reign of Henry VIII., the power of testamentary alienation of land became general (*k*), the object of rendering real estate available for the payment of debts of all classes of creditors in case the personal estate should prove insufficient for the purpose, was accomplished by means of a devise to persons not necessarily executors upon trust to sell and apply the proceeds in the first place in payment of debts, and next for the benefit of named beneficiaries; or by means of a devise to the person or persons intended to take beneficially, but subject to or charged with the payment of the testator's debts.

(*f*) Williams on Real Assets, p. 2.

(*g*) 1 Saund. Uses, 64.

(*h*) *Blatch* v. *Wilder*, 1 Atk. 420; *Deg* v. *Deg*, 2 P. Wms. 416, n 2. See Williams on Real Assets, p. 2.

(*i*) *Silk* v. *Prime*, 1 Bro. C. C. 139 n. See Williams on Real Assets, p. 5, and Cases collected in the note to *Blatch* v. *Wilder*, 1 Atk. 420.

(*k*) *Ante*, p. 63.

Lands devised in trust for sale to person other than executor.

Where the devise in trust or subject to the charge for payment of debts was to some person other than the executor, the Court of Chancery from the first assumed jurisdiction in the application of the proceeds of sale of the devised property to the exclusion of the Ecclesiastical Court. The devise was recognised as creating a trust in favour of creditors subject to the cognizance of, and enforceable only by, the Court of Chancery. The proceeds of sale of property so devised were, accordingly, from the first, distributable upon principles peculiar to the Court of Equity as equitable assets (*l*).

Lands devised to executor in trust for sale.

The fact that an executor was bound to account to the Ecclesiastical Court for all property coming to his hands by virtue of his office, for a long time interfered with the assumption by the Court of Chancery of jurisdiction in the application of proceeds of sale of land devised in trust for the payment of debts to the person named as executor. At length, however, the twofold capacity of an executor to hold property, namely, as devisee in trust and as executor, was fully recognised, and the jurisdiction of the Court of Chancery, in the application of all moneys, the creditor's remedy for the recovery of which as assets was by suit in that Court, was firmly established (*m*).

Lands subject to executor's implied power of sale under charge of debts.

Doubts were at first entertained as to the effect of a simple charge of debts upon real estate unaccompanied by any devise (*n*). It was contended, in effect, that the descent not having been broken by any actual devise, it was impossible to assume any intention on the part

(*l*) *Woolestoncroft* v. *Long*, 1 Ch. Ca. 32; *Anon.*, 2 Ch. Ca. 54; *Silk* v. *Prime*, 1 Bro. C. C. 139 n; *Barker* v. *May*, 9 B. & C. 489.

(*m*) *Silk* v. *Prime*, 1 Bro. C. C. 139 n; *Newton* v. *Bennet*, 1 Bro. C. C. 134; *Bain* v. *Sadler*, L. R. 12 Eq. 570.

(*n*) See *Newton* v. *Bennet*, 1 Bro. C. C. 134, at p. 137 n. See also Williams on Real Assets, pp. 56 *et seq.*

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of the testator to create a trust in favour of *all* creditors, but that creditors must be left to such rights as they might have at common law in respect of descended estates. It was, however, ultimately decided that a mere charge was sufficient declaration of intention upon which a Court of Equity would fasten to create a trust for all creditors, and that a charge was equivalent to a devise of the estate in substance and effect *pro tanto* upon trust to pay debts (*o*).

It has been decided that where a testator has charged his real estate with the payment of debts generally, future debts arising out of a previous liability are included (*p*).

Equitable separate estate of married woman.

Included amongst assets in equity must be mentioned the equitable separate estate (*q*) of a married woman to the extent, at least, to which such estate has been held liable for the payment of the debts of the deceased married woman. In dealing with equitable separate estate as distinguished from statutory separate estate, it must be remembered that under the old law the contract of a married woman bound her separate estate only when it appeared that such contract was made with reference to and upon the faith or credit of that estate (*r*), and that as a general rule debts contracted by a married woman were deemed to be the debts of her husband. The married woman was in no case personally liable for the payment of her debts; the remedy of her creditor could only be in equity against her separate estate. Accordingly, the separate estate of a married woman was held to be equitable assets for

(*o*) *Bailey* v. *Ekin*, 7 Ves. 319; *Shephard* v. *Lutridge*, 8 Ves. 86.

(*p*) *Morse* v. *Tucker*, 5 Hare, 79. See *Hamer's Devisee's Case*, 2 De G. M. & G. 366.

(*q*) As to statutory separate estate, see *post*, pp. 139 *et seq.*

(*r*) *Johnson* v. *Gallagher*, 3 De G. F. & J. 515; *London Chartered Bank* v. *Lemprière*, L. R. 4 P. C. 572, 597; *Wainford* v. *Heyl*, L. R. 20 Eq. 324.

the payment of such debts as she had contracted in reference to such estate in her lifetime (*s*).

Personal property appointed under general power.

The remaining assets in equity comprise property which never formed part of the estate of the deceased person, in the sense of being possessed by him as his own, that is to say, personal (*t*) property over which the deceased had a general power of appointment, and which had been actually appointed under the power (*u*).

A general power as distinguished from a particular or limited power is thus defined by Lord ST. LEONARDS (*x*): "By a general power we understand a right to appoint to whomsoever the donee pleases. By a particular power it is meant that the donee is restricted to some objects designated in the deed creating the power, as to his own children."

Courts of Equity have considered the exercise of such a power by the deceased as virtually rendering the property subject to the power the testator's own property (*y*).

It is, accordingly, well established that where any person having a general power of appointment over a fund makes an appointment of the fund by will and appoints an executor, the executor, when he has proved the will, is in equity entitled to receive the appointed fund and to administer it in place of the original trustees (*z*), and as equitable assets, in the first instance,

(*s*) *Owens* v. *Dickenson*, Cr. & Ph. 48, 53; *Johnson* v. *Gallagher*, *supra*; *Hodges* v. *Hodges*, L. R. 20 Ch. D. 749. See also *London Chartered Bank* v. *Lemprière*, *supra*, disapproving *Shattock* v. *Shattock*, L. R. 2 Eq. 182, 194.

(*t*) See as to real property appointed, *post*, p. 134.

(*u*) *Lasselles* v. *Cornwallis*, 2 Vern. 465; *Holmes* v. *Coghill*, 7 Ves. 499.

(*x*) Sugd. Powers (8th ed.), 394.

(*y*) Williams on Real Assets, p. 12.

(*z*) *Re Philbrick*, 34 L. J. Ch. 368; *Re Hoskins' Trusts*, 5 Ch. D. 229; 6 Ch. D. 281, C. A. See *Re Treasure*, *Wild* v. *Stanham*, [1900] 2 Ch. 648; *Re Moore*, *Moore* v. *Moore*, [1901] 1 Ch. 691; *Re Fearnsides*, *Baines* v. *Chadwick*, [1903] 1 Ch. 250.

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for payment of debts (*a*). If no executor be appointed, or if the person appointed executor die without having proved the will, the person appointed administrator *cum testamento annexo* will stand in the same position (*b*).

It makes no difference that the power is exercised in pursuance of a covenant in that behalf given by the testator in his lifetime for valuable consideration. The appointees in such case are mere volunteers under the will, and cannot withdraw the property from its liability to be administered in due course in payment of debts (*c*).

Property appointed by married woman.

Property appointed by a married woman, though under a general power of appointment, was not, apparently, prior to the passing of the Married Women's Property Act, 1882 (*d*), assets for the payment of debts contracted by her upon the credit of her separate estate (*e*); but such appointed property was, nevertheless, assets for the payment of her antenuptial debts (*f*).

SECTION VI.

ASSETS BY STATUTORY ENACTMENT.

Position of creditors under common law.

As the result of comparatively recent enactments, the real estate of a deceased debtor is now generally

(*a*) *Pardo* v. *Bingham*, L. R. 6 Eq. 485; *Re Power*, [1901] 2 Ch. 659; *Re Peacock's Settlement*, *Kelcey* v. *Harrison*, [1902] 1 Ch. 552, at p. 555; *Commissioners of Stamp Duties* v. *Stephen*, [1904] A. C. 137, at p. 140.

(*b*) *Re Peacock's Settlement*, *supra*.

(*c*) *Re Lawley*, *Zaiser* v. *Lawley*, [1902] 2 Ch. 799, affirmed *sub nom. Beyfus* v. *Lawley*, [1903] A. C. 411. See *Re Guedalla*, *Lee* v. *Guedalla's Trustee*, [1905] 2 Ch. 331.

(*d*) 45 & 46 Vict. c. 75, as to which, see *post*, p. 140.

(*e*) *Vaughan* v. *Vandersteyn*, 2 Drew. 165; *Re Roper*, *Roper* v. *Doncaster*, 39 Ch. D. 482, 491; Williams on Real Assets, p. 107. But see *London Chartered Bank* v. *Lemprière*, L. R. 4 P. C. 572; *Re Harvey's Estate*, *Godfrey* v. *Harben*, 13 Ch. D. 216; *Hodges* v. *Hodges*, 20 Ch. D. 749.

(*f*) *Re Parkin*, *Hill* v. *Schwarz*, [1892] 3 Ch. 510, at p. 521.

available to his creditors for the satisfaction of debts of all kinds incurred by the deceased in his lifetime. This state of the law, it has been said (*g*), "is the result of a long and arduous struggle for the just rights of creditors." It is intended to trace here the successive steps in this struggle only so far as is necessary in order to form a definite conception of the present law on the subject.

Whether real estate could be rendered available for the payment of the debts of a deceased owner depended at common law, as has been seen, upon the circumstance of its being allowed to descend to the heir-at-law, or, in equity, upon directions in the will of a testator charitably disposed towards his creditors.

Evasions by debtors of common law liability.

The power of testamentary disposition conferred by the Legislature in the reign of Henry VIII. (*h*), enabled a testator dying indebted and minded to defeat the claims of his creditors, to do so by the simple expedient of devising his real estate without imposing any trust or adding any direction relative to the payment of his debts.

It was the employment by testators of this expedient to the detriment of creditors, which, though legally valid, was morally fraudulent, that led to the passing of the Statutes of Fraudulent Devises, now to be considered.

Amendments of common law.

The first and third of those statutes (*i*) were directed towards rendering devised freehold property available for the satisfaction of debts by specialty in which the heirs were bound. The devisee, as to freehold estate devised to him, was placed in precisely the same position as the heir-at-law was placed by the common law

(*g*) Williams on Real Assets, p. 1.
(*h*) 32 Hen. 8, c. 1, explained by 34 & 35 Hen. 8, c. 5.
(*i*) 3 & 4 Will. & M. c. 14; 11 Geo. 4 & 1 Will. 4, c. 47.

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as to freehold estates descended (*k*). The creditor by specialty in which the heirs were bound was enabled to bring an action at law against the devisee and recover up to the value of the devised estate, so that the devised estate became legal assets in the limited sense already explained.

In the meantime, between the passing of the two Acts last referred to, Sir Samuel Romilly's Act (*l*) had dealt with the real estate of persons, who at their death were traders within the meaning of the bankruptcy laws, in the same terms in which Lord Romilly's Act (*m*) afterwards dealt with the real estate of persons generally. Sir Samuel Romilly's Act, together with the first of the Statutes of Fraudulent Devises (*n*), was repealed, but re-enacted by the consolidating Act already mentioned (*o*).

The consolidating Act also confers upon the Court certain administrative powers exercisable in suits brought against the heir by creditors by specialty in which the heirs were bound (*p*).

By Lord Romilly's Act (*q*), it is enacted as follows:

Freehold and copyhold estates in all cases to be assets for the payment of simple contract and specialty debts.

"That from and after the passing of this Act, when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customary-hold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in Courts of Equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the

(*k*) *Re Illidge, Davidson* v. *Illidge*, 27 Ch. D. 478, C. A.
(*l*) 47 Geo. 3, c. 74.
(*m*) 3 & 4 Will. 4, c. 104.
(*n*) 3 & 4 Will. & M. c. 14, *ante*, p. 122.
(*o*) 11 Geo. 4 & 1 Will. 4, c. 47.
(*p*) *Post*, p. 183.
(*q*) 3 & 4 Will. 4, c. 104.

same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this Act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound: Provided always, that in the administration of assets by Courts of Equity under and by virtue of this Act all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands."

It will be observed that the enactment above set out comprises two distinct clauses and a proviso.

The first clause, by constituting all such realty as was formerly exempt from liability for payment of debts of a deceased person, assets to be administered in Courts of Equity, for the payment of all his "just debts," marks the successful termination in favour of creditors of their struggle for "just rights," dating from the first of the Statutes of Fraudulent Devises. The second clause, by prescribing the remedy of creditors in respect of such assets, indicates the nature or character of the assets, while the proviso at the end of the enactment provides for the right to precedence of a certain class of creditors over others in the application of the assets towards payment of debts.

Construction of first clause.

The language of the first clause appears to include every conceivable estate or interest in realty to which the deceased was entitled at the time of his death, provided such interest was of a continuing and transmissible nature and devisable.

Equitable interests.

Real estate, the legal estate in which is outstanding in a trustee, is clearly within the clause; thus, an equity of redemption being an estate in land (*r*),

(*r*) *Casborne* v. *Scarfe*, 1 Atk. 606.

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whether of freeholds (*s*) or copyholds (*t*), has been held to be assets.

General power of appointment actually exercised.

So, also, real estate over which the deceased person had a general power of appointment, and which had been actually appointed by the deceased by his will in exercise of the power, was held to be assets under this clause (*u*).

In order, however, to render real estate over which a person has power to appoint by will, assets in the hands of his real representatives, the power must have been actually exercised, for equity will not aid the non-execution of a power (*x*).

What amounts to exercise of.

By s. 27 of the Wills Act (*y*), it is enacted that:

> "A general devise of the real estate of the testator . . . in any place or in the occupation of any person mentioned . . . or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; . . ."

Accretions to land.

The general effect of the first clause of Sir John Romilly's Act is to make the land itself assets (*z*), and, accordingly, by analogy to the common law (*a*), it has been held that the rents and profits of the land are assets by accretion (*b*). So it would seem that all such

(*s*) *Foster* v. *Handley*, 1 Sim. (N.S.) 200; *Beale* v. *Symonds*, 16 Beav. 406.

(*t*) *Re Burrell*, *Burrell* v. *Smith*, L. R. 9 Eq. 443.

(*u*) *Fleming* v. *Buchanan*, 3 De G. M. & G. 976.

(*x*) *Holmes* v. *Coghill*, 7 Ves. 499.

(*y*) 7 Will. 4 & 1 Vict. c. 26.

(*z*) *Re Hyatt*, *Bowles* v. *Hyatt*, 38 Ch. D. 609.

(*a*) *Ante*, p. 119.

(*b*) *Re Illidge*, *Davidson* v. *Illidge*, 27 Ch. D. 478, C. A.; *Re Hyatt*, *Bowles* v. *Hyatt*, *supra*.

chattels as, being annexed to the freehold, were by the common law exempt from liability for the payment of simple contract debts (*c*), are assets in equity within the meaning of the clause, being essentially "part of the real estate" (*d*).

First clause not to be controlled by second.

The express enactment of the first clause that real estate shall be assets, is not to be controlled by the wording of the second clause prescribing the remedy of the creditor (*e*), so that it is immaterial that there is no heir or devisee against whom a suit in equity may be brought. Thus, it has been held that land and the rents and profits thereof will be assets under the first clause, although neither descending to the heir, nor devised (*f*), and although the rents and profits may not have been received by the persons named as devisees (*g*). In one of the cases referred to, land which had devolved upon the lord by escheat; and in another case, rents and profits which had been received by a person appointed trustee after the death of the testator, were held to be assets.

The principle of these decisions appears now to be applicable to all real estate devolving by virtue of the Land Transfer Act, 1897 (*h*), upon the personal representative of the deceased owner.

Clause extends to creditors having already common law right.

The clause extends to real estate, in respect of which creditors by specialty in which the heirs were bound had already a common law action of debt or covenant, but the equitable remedy given by the Act is in addition to, and not in substitution for, the legal remedy (*i*).

(*c*) *Ante*, p. 109.
(*d*) *Re Illidge*, *Davidson* v. *Illidge*, *supra*, at p. 483.
(*e*) *Evans* v. *Brown*, 5 Beav. 114; *Downe* v. *Morris*, 3 Hare, 394.
(*f*) *Evans* v. *Brown*, *supra*; *Hughes* v. *Wells*, 9 Hare, 749.
(*g*) *Re Hyatt*, *Bowles* v. *Hyatt*, 38 Ch. D. 609.
(*h*) 60 & 61 Vict. c. 65.
(*i*) *Re Illidge*, *Davidson* v. *Illidge*, 27 Ch. D. 478, 482, C. A. See as to the effect of the Land Transfer Act, 1897, upon the creditor's common law remedy, *ante*, pp. 123, 124.

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The property excepted from the clause, namely, property which the testator shall, by his last will, have charged with, or devised subject to, the payment of his debts, has already been considered (*k*).

Just debts.

The "just debts," for the payment of which under this clause real estate of a deceased owner is to be assets, include all debts of every description actually due from such deceased owner at his death, and also all liabilities which may result out of obligation entered into by him during his life (*l*).

Nature of assets created by Romilly's Act.

The nature or character of the class of statutory assets created by Lord Romilly's Act, must now be considered.

Applying the test applicable to all assets, viz., whether the remedy of the creditor is at common law or in equity, it will at once be seen that these statutory assets are expressly made equitable assets by the second clause of the enactment. That clause gives to all creditors the right to bring the same suits in equity as could formerly have been brought by creditors by specialty in which the heirs were bound (*m*).

It appears to have been sometimes assumed that the effect of the proviso at the end of the enactment was to make these assets legal assets. But that proviso merely declared that *in the administration of assets by Courts of Equity* under and by virtue of that Act certain creditors were to be paid in priority to others, and did not impress the assets so to be administered with all the attributes of legal assets. The proviso is now repealed (*n*), and it is clear that, independently, at any rate, of the Land Transfer Act, 1897 (*o*), to be

(*k*) *Ante*, pp. 126, 127.
(*l*) *Hamer's Devisees' Case*, 2 De G. M. & G. 366.
(*m*) See *post*, p. 181.
(*n*) 32 & 33 Vict. c. 46.
(*o*) 60 & 61 Vict. c. 65.

considered in the next section, these assets are equitable assets to be administered in all respects as other equitable assets (*p*).

Estates *pur autre vie.*

Among statutory assets must be included estates held by the deceased as tenant *pur autre vie.* Estates so held form a peculiar class of statutory assets. Devolving at common law upon the person named in the grant as special occupant (*q*), they were not chargeable as assets by descent in the hands of the heir, though he succeeded as special occupant, for his title was by special occupancy and not by descent; nor were they chargeable as assets *entre mains* in the hands of the executor though he succeeded as special occupant, for his title also was by special occupancy and not *quâ* executor, by which latter title he could at common law succeed only to personal estate. Being, on the other hand, alienable by the owner in his lifetime (*r*), estates *pur autre vie* held an anomalous position among freeholds at common law and early became the subject of legislative enactment.

Statute of Frauds.

The Statute of Frauds (*s*) having rendered estates *pur autre vie* devisable and having provided that if no devise were made of an estate *pur autre vie*, it should be chargeable in the hands of the heir as assets by descent if it should come to him as special occupant, further provided that if there should be no special occupant to an estate *pur autre vie*, it should go to the executors or administrators of the deceased tenant and become assets in their hands. The effect of this enactment as amended by a later statute (*t*) was to render a freehold estate *pur autre vie* granted to A.,

(*p*) *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. App. 567; *Walters* v. *Walters*, 18 Ch. D. 182; *Re Illidge*, *Davidson* v. *Illidge*, 27 Ch. D. 478, C. A.

(*q*) See *ante*, p. 60.

(*r*) Co. Lit. 41 b.

(*s*) 29 Car. 2, c. 3, s. 12, *ante*, p. 63.

(*t*) 14 Geo. 2, c. 20, s. 9.

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his executors, administrators, and assigns, personal estate in equity for all purposes (*u*).

Wills Act.

The Wills Act (*x*) repealed all previous enactments respecting estates held *pur autre vie*, and, after re-enacting those provisions of the Statute of Frauds rendering estates *pur autre vie* devisable and chargeable in the absence of any disposition by will as assets by descent in the hands of the heir, if coming to him as special occupant, provided that:

> ". . . In case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

Circumstances under which there is no special occupant.

It is to be observed that there may be no special occupant to the original tenant of an estate *pur autre vie* either by reason of no words of limitation having been contained in the grant of the estate to him, or by reason of the original tenant having disposed of his estate by will. In the case of a devise, as in the case of an alienation *inter vivos*, there can, of course, be no special occupant to the original tenant (*y*). The devisee in the one case (*z*), the alienee in the other (*a*), becomes tenant *pur autre vie* by assignment, subject in the

(*u*) *Ripley* v. *Waterworth*, 7 Ves. 425.

(*x*) 7 Will. 4 & 1 Vict. c. 26, s. 6.

(*y*) The dictum of FRY, J., in *Re Barber's Settled Estates*, 18 Ch. D. 624, to the contrary, is inconsistent with the older cases cited below, and appears to be inaccurate.

(*z*) *Doe* v. *Lewis*, 9 M. & W. 662; *Re Inman, Inman* v. *Inman*, [1903] 1 Ch. 241.

(*a*) *Northen* v. *Carnegie*, 4 Drew. 587.

former case to the assent of the executor; and the devise (*b*) or assignment (*c*) will merely indicate the person, if any, entitled as special occupant to the devisee or grantee.

Result of Wills Act.

With this explanation, it may be stated as the result of the last-mentioned enactment that an estate *pur autre vie* limited to A., his heirs and assigns, and devised, even although the devisee be also heir-at-law (*d*), and an estate *pur autre vie* limited to A. simply or to A., his executors, administrators, and assigns, will devolve upon the executor or administrator of the deceased tenant, and be applicable by him in the same manner as personal estate vesting in him at the common law—that is to say, as legal assets (*e*).

Separate property of married women.

Finally, with the species of property owing its liability as assets to statutory enactment, must be classed the statutory separate property of married women.

Married Women's Property Act, 1870.

It has been decided that the property of a married woman made separate property by virtue of the Married Women's Property Act, 1870 (*f*), is to be taken to be her separate estate to be got at in the same way as under the old law, namely, through a Court of Equity, and is accordingly equitable assets distributable and to be applied after her death *pari passu* amongst her creditors as equitable assets (*g*).

Married Women's Property Act, 1882.

The question whether the property of a married woman made separate property by the Married Women's

(*b*) *Doe* v. *Lewis*, *supra*. See *Re Sheppard*, *Sheppard* v. *Manning*, [1897] 2 Ch. 67; *Re Inman*, *Inman* v. *Inman*, [1903] 1 Ch. 241.

(*c*) *Re Michell*, *Moore* v. *Moore*, [1892] 2 Ch. 87; *Earl of Mount-Cashel* v. *More-Smyth*, [1896] A. C. 158, 165.

(*d*) *Strickland* v. *Strickland*, 10 Sim. 374.

(*e*) *Christy* v. *Courtenay*, 26 Beav. 140; *Reynolds* v. *Wright*, 2 De G. F. & J. 590; *Re Inman*, *supra*.

(*f*) 33 & 34 Vict. c. 93.

(*g*) *Re Poole's Estate*, *Thompson* v. *Bennett*, 6 Ch. D. 739.

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Property Act, 1882 (*h*), ought to be treated as legal or equitable assets, has not yet arisen for decision; but it would appear from the construction which has been put upon the several provisions of that Act bearing upon the subject of assets, that separate property arising as well under the Act of 1882, as under the Act of 1870, must be considered as equitable assets distributable *pari passu* among all the creditors of the deceased married woman.

Statutory separate property devolves in same manner as separate estate.

Notwithstanding that a married woman is enabled by the Act of 1882 (*i*) to hold and dispose of "separate property" as a *feme sole* without the intervention of any trustee, the Act does not appear to have rendered such property her absolute property; but separate property, subject to being so held, is to be treated as property belonging to the married woman for her separate use (*k*), so that, if consisting of personal estate, it will still devolve, upon her death intestate, upon her husband in preference to her next-of-kin (*l*).

Remedy of creditor under Married Women's Property Act, 1882, against personal representative same as against married woman during her life.

Owing to the peculiar wording of the Act, some difficulty is presented when it is endeavoured to determine the nature of these statutory assets by reference to the test usually applied for that purpose, viz., the remedy prescribed to the creditor against the personal representative.

It is provided by s. 23 of the Act that—

> "For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."

Provisions as to liability of married

The liability for debt to which a married woman is made subject, by the Act, during her lifetime,

(*h*) 45 & 46 Vict. c. 75.
(*i*) *Ibid.* s. 1.
(*k*) *Re Bowen, James* v. *James*, [1892] 2 Ch. 291.
(*l*) *Re Lambert's Estate, Stanton* v. *Lambert*, 39 Ch. D. 626.

has been said to be a proprietary rather than a personal liability (*m*), and is defined by s. 1 (2), as follows:

Woman during her life.

> "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole . . . and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

The only means here indicated of satisfaction of a judgment recovered against a married woman are to be found in her property, not in her person. The section really imposes a new liability on a married woman at law which will produce the same result as was before the Act produced in equity (*n*). The same liability is imposed by s. 23 upon her personal representative after her death with the same result. He can only be made liable as to that which was the married woman's separate property; and judgment may be obtained against him only to the same extent as it could have been obtained against her if she had been alive (*o*). The remedy, therefore, of a creditor against the personal representative is not the common law remedy applicable to the case, but is that specially prescribed by the statute, viz., an action at law having the same effect as was before the Act produced in equity by a different process (*oo*).

Amending provisions of Married Women's Property Act, 1893.

The provisions of s. 1 (2), above set out, were supplemented and explained by sub-ss. (3), (4), which are now repealed by the Married Women's Property Act,

(*m*) *Scott* v. *Morley*, 20 Q. B. D. 120, at p. 128.
(*n*) *Ibid.* at pp. 126, 129.
(*o*) *Surman* v. *Wharton*, [1891] 1 Q. B. 491.
(*oo*) *Scott* v. *Morley*, *supra*, at pp. 125, 126.

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1893 (*p*), and for which s. 1 of the last mentioned Act is substituted as follows:

Effect of contracts by married women.

"Every contract hereafter (*q*) entered into by a married woman, otherwise than as agent,

"(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

"(b) Shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

"(c) Shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating" (*r*).

By s. 4 of the Married Women's Property Act, 1882 (*s*), it is further provided that:

Execution of general power.

"The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

Effect of section.

The above section extends to the case of an appointment made since the Act by a married woman who had debts and liabilities existing at the date the Act came into operation. Accordingly, when a married woman obtained a protection order, thereby becoming, under ss. 25, 26 of the Matrimonial Causes Act, 1857 (*t*), a *feme sole* with regard to property, and capable of contracting debts and obligations, and

(*p*) 56 & 57 Vict. c. 63.

(*q*) See *Re Wheeler, Hankinson* v. *Hayter*, [1904] 2 Ch. 66.

(*r*) See, as to the construction of this proviso, *Barnett* v. *Howard*, [1900] 2 Q. B. 784, C. A.; *Brown* v. *Dimbleby*, [1904] 1 K. B. 29.

(*s*) 45 & 46 Vict. c. 75.

(*t*) 20 & 21 Vict. c. 85.

entered into a contract and incurred liabilities before the passing of the Act, it was held that property appointed by her by will under a general power of appointment was assets for the satisfaction of those liabilities (*u*).

As a general rule, however, a married woman prior to the passing of the Act, was not capable of contracting debts and obligations in the sense in which a person completely *sui juris* is said to contract debts, and an appointment by a married woman by will under a general power of appointment does not, therefore, by virtue of the above section, make the appointed property liable as assets to engagements entered into with her on the credit of her separate estate prior to the passing of the Act (*x*).

But such an appointment operates to render the appointed property assets for the payment of debts and liabilities incurred by the married woman since the passing of the Act, whether or not, at the time of entering into the engagements whereby the debts were incurred, she was possessed of separate property under the Act (*y*).

SECTION VII.

EFFECT OF LAND TRANSFER ACT, 1897, UPON NATURE OF ASSETS.

Whether equitable assets are made legal by Land Transfer Act, 1897.

It has already been shown that all real estate charged with or devised subject to the payment of debts was, in cases of death prior to January 1st, 1898, the date upon which the Land Transfer Act, 1897, came into operation, regarded as equitable assets for the payment

(*u*) *Re Hughes, Brandon* v. *Hughes*, [1898] 1 Ch. 529, C. A.

(*x*) *Re Roper, Roper* v. *Doncaster*, 39 Ch. D. 482.

(*y*) *Re Ann, Wilson* v. *Ann*, [1894] 1 Ch. 549; *Re Hughes, Brandon* v. *Hughes*, *supra*, at p. 538.

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of debts (*z*). Whether or not such real estate became vested immediately, by virtue of the will, in the executors themselves, as devisees in trust for the purposes of the will, made no difference in this respect. Further, it has been shown that, by virtue of Lord Romilly's Act, all real estate not thus disposed of by will, was also distributable as equitable assets (*a*). The question which now arises for discussion is whether or no the effect of the Land Transfer Act, 1897, has been to convert all real estate to which it applies from equitable into legal assets.

The principle of the decision in *Cook* v. *Gregson*.

In the first place, it is frequently asserted that such a conversion is necessarily brought about by the alteration in the law of devolution of real estate effected by the first section of the Act, the provision, namely, that real estate shall, notwithstanding any testamentary disposition, devolve to and become vested in the personal representative of the deceased owner as if it were a chattel real vesting in him (*b*). If the test formulated in *Cook* v. *Gregson* (*c*) be applied, namely, that such property as vests in the executor *virtute officii* is to be treated as legal assets, then, it is said, real estate falls within the category of legal assets. This view, however, appears to be erroneous. A careful study of the VICE-CHANCELLOR'S judgment in the case referred to, will not fail to disclose the fact that the test which he supplies is based upon the law of devolution of real and personal property respectively, as it then stood. "The distinction refers," says the learned judge, "to the remedies of the creditor. The question is not whether the testator's interest was legal or equitable, but whether a creditor of the testator, seeking to get

(*z*) *Ante*, p. 127.

(*a*) 3 & 4 Will. 4, c. 104, *ante*, p. 136.

(*b*) See Williams on Executors (10th ed.), p. 1308.

(*c*) 3 Drew. 547.

paid out of such assets, can obtain payment thereout from a Court of Law, or can only obtain it through a Court of Equity." The present-day equivalent of this proposition, which is abundantly proved by the cases cited in the foregoing pages of the present chapter, is that the question whether assets are legal or equitable depends upon whether a creditor, in order to obtain payment of his debt thereout, must invoke the legal or equitable jurisdiction of the Court (*e*).

Application of principle under present law of devolution.

Real estate charged with or devised subject to the payment of debts, was by virtue of the charge or devise made subject to the equitable jurisdiction of the Court, but real estate, not so charged or devised, was not directly subject to that jurisdiction. Lord Romilly's Act, it is true, created an immediate general charge upon such real estate, but, as will be seen later (*f*), that charge was an inchoate rather than an actual charge until the jurisdiction of the Court was invoked and a decree for administration obtained. Some further provision was still necessary to protect creditors from intermediate dealings with the property by the heir-at-law or devisee in whom it vested immediately upon the death of the owner. That provision was made by the Land Transfer Act, 1897, by virtue of which all real estate of a deceased person is impressed, as from the moment of his death, with a trust for the payment of his debts and is thus brought immediately within the equitable jurisdiction of the Court. "There is now no occasion to look into the will to see if the testator has charged his real estate with payment of debts, because the law has done it for him, and really the charge, if it is to be found in the will, is now in that respect useless" (*g*). Whether, therefore, real

(*e*) See the distinction between legal and equitable assets fully discussed *ante*, pp. 104 *et seq*.

(*f*) See *post*, p. 182.

(*g*) *Re Kempster*, *Kempster* v. *Kempster*, [1906] 1 Ch. 446.

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estate comes to the hands of the personal representative charged by the will, as it might have done under the former law, or charged by operation of law, as it must under the present Act, the result appears to be the same. It comes immediately within the original equitable jurisdiction of the Court. In neither case, it is submitted, can the personal representative be said to acquire it *virtute officii*, within the meaning of that expression as used by KINDERSLEY, V.-C., in *Cook* v. *Gregson* (*h*). The office of an executor, as will appear from a perusal of Wentworth's Office of an Executor, and other works of the same period, was originally to administer the goods and chattels and personal estate of the deceased which, vesting in him at common law for that purpose, were said to vest *virtute officii*. It is impossible that at the date of the decision in *Cook* v. *Gregson* (*h*), the expression "*virtute officii*" could have been used by the VICE-CHANCELLOR in any other sense. If *virtute officii* be taken to mean "by virtue only of the common law office of personal representative," the test formulated by the VICE-CHANCELLOR continues a true indication of the rule (*i*); but to assert that real estate vests in the personal representative *virtute officii* for no other reason than that it devolves upon him under the Land Transfer Act, and then to apply the test in question for the purpose of determining whether real estate is now constituted legal or equitable assets, is to do so in blind disregard of the principles underlying the decision from which the test is taken.

Effect of provisions for administration in s. 2 of the Land Transfer Act.

If any indication is to be found of the intention of the Legislature to confer upon creditors a common law right of action against the personal representative in respect of real estate within the meaning of the Act, it

(*h*) 3 Drew. 547.

(*i*) *Cf.* the decision in *Re Palmer*, *Palmer* v. *Rose-Innes*, [1900] W. N. p. 9.

must be found in some other section than the first or vesting section. It has been suggested that the provisions of the second section of the Act, by necessary implication, confer such a right of action; and, in particular, it has been said that the provision contained in the third sub-section of s. 2 has that effect, the provision, namely, that "in the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, *and with the same incidents*, as if it were personal estate." It must be pointed out, however, that the whole of s. 2 is directed entirely to "administration"—the marginal note to the section is "Provisions as to administration"—and that the creditor's right of action for debt, or upon the covenant, which is a right altogether distinct and separate from the right to have the estate administered, cannot fairly be said to be within the purview of the section.

The only direct reference to the personal representative's liability is to be found in conjunction with the general powers, rights and duties of administration. By s. 2 (2) of the Act, the powers, rights, duties, and liabilities of personal representatives in respect of personal estate are expressly made to apply to real estate so far as the same are applicable. An action at common law in respect of personal estate is of course a liability to which the personal representative is subject as such; it is a liability nevertheless, which, having regard to the provisions of the third section of the Act, can scarcely be said to be applicable to real estate, inasmuch as it is open to the personal representative under that section, "at any time after the death of the owner of any land," to determine his liability in respect of the land (with the exception of such personal liability as he may have incurred in the course of management) by an assent or conveyance made subject

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to a charge for all moneys (if any) which he may be liable to pay, and thus to render abortive any action at common law brought against him by a creditor of the estate in respect of the land. Indeed, the third section of the Act appears to be framed upon the assumption that, notwithstanding the earlier sections, real estate retains its character of equitable assets.

Assuming the conclusion to be correct that an action at common law will not lie against the personal representative in respect of real estate, it is, of course, impossible that real estate can be administered with precisely the same incidents as personal estate, *i.e.*, subject to the representative's rights of retainer and preference, and to a creditor's right to obtain priority by recovering judgment against the representative for his debts, all of which depend upon the common law right of action. So far as regards the right of retainer, it was recently decided, in accordance with the view here expressed, that a claim on the part of an administratrix to retain, out of the proceeds of sale of real estate devolving upon her under the Act, was not maintainable (*k*). It seems to follow from this decision that none other of the legal rights or privileges which depend upon the creditor's common law right of action is maintainable, notwithstanding the phraseology of the second section of the Act. The fact that the administrative duties and liabilities of the personal representative in respect of real estate are not anywhere stated specifically and in detail, but only generally and by reference to a large mass of existing enactments and rules of law, seems of itself to afford a reason for refusing to place upon the expression "incidents," occurring in that section, a too literal construction.

(*k*) *Re Williams, Holder* v. *Williams*, [1904] 1 Ch. 52.

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Conclusion.

In conclusion, it may be observed that the creditor's right at law is by no means necessary, in the interests of abstract justice; it has for long been regarded both by the Legislature and the Court, as a privilege to be respected, but not to be extended; and it is submitted that the above considerations point strongly to the conclusion that the attitude of the Legislature in this respect has remained unchanged; that there is nothing in the Land Transfer Act, 1897, to warrant the assumption that the Legislature intended, by implication, to confer any legal remedy upon creditors in respect of real assets vesting under the Act in the personal representative, in addition to the equitable remedy already recognised by Courts of Equity or conferred by statute; but that assets which, prior to the Act, were equitable, will remain of the same nature, and be distributable accordingly, notwithstanding that they are now rendered immediately available in the hands of the personal representative for the payment of debts.

PART II.

OF THE ADMINISTRATION OF ASSETS IN PAYMENT OF DEBTS.

CHAPTER VII.

OF THE COLLECTION AND INTERIM MANAGEMENT OF THE DECEASED'S PROPERTY.

SECTION I.

Of the Collection of the Effects of the Deceased.

Initial duty of personal representative.

It is the initial duty of a personal representative, as of any other trustee entering upon the duties of his office, to ascertain precisely the extent of the property committed to his charge and to obtain personal control over it (*a*).

As to necessity of making an inventory.

By an ancient statute (*b*) every personal representative was required, before dealing with the assets, to make a full and complete inventory of the effects of the deceased in the manner and according to the form thereby

(*a*) As to the practical necessity of obtaining a grant of probate before attempting to deal with the property, real or personal, of which a testator dies seised or possessed, see *ante*, pp. 29—31. The persons who at the testator's death have control of any personal chattels belonging to him, banking companies with whom he has accounts or has deposited securities, and other companies in whose shares he may have invested, will all require production of the probate for inspection, as evidence of the executor's title, before making any transfer to him or at his direction.

(*b*) 21 Hen. 8, c. 5.

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prescribed (*c*). The inventory so made must have been exhibited before the Court by the executor or administrator: by the former within a reasonable time from the death of the testator, and by the latter, at the time limited by the condition of the administration bond.

The requirements of the above statute have long since ceased to be strictly enforced. At the commencement of the present reign it was said by a writer of authority (*d*) that the practice with regard to inventories which then prevailed was that neither the executor nor administrator, in general cases, exhibited any inventory whatsoever, unless he were cited for that purpose in the spiritual Court, at the suit of a creditor or legatee, or party in distribution, in which case he was bound to exhibit an inventory and account. The same writer adds that it is nevertheless the part of a prudent person, who sustains the office of executor or administrator, in every case to see that the effects are carefully appraised, and reduced into an inventory, not only because he might be cited to produce it as above mentioned, but also because a distinct and accurate knowledge of the fund is necessary to direct him in the safe execution of the trust.

Inventory for purpose of accounts.

And so, it would seem, the matter rests at the present day. The personal representative, as will be seen later, is bound to account, at the instance of any party interested in the residue, for what he has received, or, if wilful default be proved against him, for what, but for his wilful default, he ought to have received; and for this purpose an inventory of some sort must necessarily constitute the debit side of the account (*e*).

(*c*) See as to the strict requirements of this Act, Swinb. (7th ed.), pp. 755—767.

(*d*) See 4 Burn. Eccl. Law (8th ed.), 265, 266.

(*e*) See, further, as to the liability of a personal representative to exhibit an inventory and render an account, and as to the mode in which that liability may be enforced, Tristram and Coote's Probate Practice (14th ed.), p. 209; and as to the form of the inventory, *ibid.*, p. 819.

Authority of personal representative to collect.

To enable the personal representative effectually to discharge the duty of getting in and collecting the property comprising the deceased's estate, the law invests him with the like powers and authority over the property as might have been exercised by the deceased owner whose representative he is (*f*).

Right to recover goods.

He must collect the goods of the deceased, and has power to recover them from any person in whose possession they may be (*g*), and he may redeem such as are in pledge (*h*). In *Cobbett* v. *Clutton* (*i*) a box containing documents belonging to a deceased person was in the possession of the defendant, who was a solicitor. The defendant refused to deliver the box to the plaintiff, who was the executor, unless the latter would give him a schedule of the contents of the box; the plaintiff then brought an action of trover for recovery of the box and its contents, and it was held that the plaintiff, as executor, was entitled to the possession of the box and documents without giving any schedule, and was entitled to bring his action on the refusal of the defendant to deliver them up.

Right to require transfer of stocks and shares.

The personal representative must assume control of the investments and securities belonging to the deceased and may, although not bound so to do, require the transfer into his name of Bank of England stock (*k*), and of stock or shares in any company registered under the Companies Acts (*l*) or Companies Clauses Consolidation Act, 1845 (*m*), of which the deceased was a

(*f*) Co. Lit. 208 a.

(*g*) 2 Bla. Com. (10th ed,) 510.

(*h*) Wentw. Off. Ex. (14th ed.), pp. 182 *et seq.*; *Kemp* v. *Westbrook*, 1 Ves. 278.

(*i*) 2 C. & P. 471.

(*k*) *The Bank of England* v. *Moffat*, 3 Bro. C. C. 260; *Franklin* v. *The Bank of England*, 9 B. & C. 156; *Churchill* v. *The Bank of England*, 11 M. & W. 323. See 33 & 34 Vict. c. 71, s. 23.

(*l*) 25 & 26 Vict. c. 89, ss. 22, 24. See *ante*, p. 94, and see *James* v. *Beuna, etc. Syndicate, Limited*, [1896] 1 Ch. 456 [C. A.].

(*m*) 8 & 9 Vict. c. 16, s. 18.

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member, and may, of course, require the payment out to him of any cash at the bank standing to the credit of the deceased.

Right to sue for debts, etc.

He must also collect and reduce into possession debts and other choses in action due to the deceased, and enforce all claims which survive to the estate (*n*), and has authority for this purpose to bring and institute all actions or other necessary proceedings (*o*).

Right to enforce contracts relating to personalty.

The executor or administrator is the only person whom the law has ever regarded as representing the deceased as regards his personal estate or any contract or obligation relating thereto; and whether or not the executor or administrator is expressly named in the contract or obligation, the right to enforce it by action will vest in him and in him alone (*p*). So in an old case (*q*), an action was brought by the administratrix of a deceased person upon a promise made by the defendant to pay fifty pounds to the deceased, his heirs or executors, and no averment was made that the fifty pounds had not been paid to the heir of the deceased. It was held by the Exchequer Chamber (reversing the decision of the Court below) that such an averment was unnecessary, "the thing contracted for being a mere personalty; for by the law all personalties and rights to the personalties are given to the executors or administrators, as all realties and rights to realties are given to the heir; the executors or administrators being representatives of a man, in respect of his personalties, in like manner as the heir in respect of the realties; therefore, if a man enters into an obligation to pay to

(*n*) See as to claims surviving to the estate, *ante*, pp. 113 *et seq.*

(*o*) See cases collected in Toller (7th ed.), pp. 431 *et seq*; see also Godolph. (3rd.), pp. 154 *et seq.*; Wentw. Off. Ex. (14th ed.), pp. 159, *et seq.*

(*p*) Co. Lit. 209 a; 210 a.

(*q*) *Devon* v. *Pawlett*, 11 Vin. Abr. 133, pl. 27.

another or his heirs a sum of money, his executors or administrators and not his heirs shall have it."

Right to bring actions for recovery of land and upon contracts relating to land.

Freehold property, together with such chattels as formerly devolved to the heir-at-law as annexed to the freehold, will now vest, pursuant to s. 1 of the Land Transfer Act, 1897 (*r*), in the personal representative of the deceased owner, who will apparently have power, by virtue of the provisions of s. 2 of that Act, not only to bring actions for the recovery of the land so devolving upon him, but also to sue in respect of any contract relating to the realty, the benefit of which formerly devolved upon the heir (*s*).

Right to enforce payment of rentcharge by distress and entry.

Freehold rentcharges (*t*) being incorporeal hereditaments (*u*) will also devolve, by virtue of the Act, as "real estate" on the personal representative.

It is not uncommon, especially in the north of England, for land to be conveyed in fee, with a reservation to the grantor and his heirs of a perpetual rentcharge issuing thereout, commonly called a fee-farm rent. Formerly, express powers of distress and entry were usually inserted in deeds of grant of rentcharges, but now their insertion is rendered unnecessary by the Conveyancing and Law of Property Act, 1881 (*x*), which enables the grantee of a rentcharge under instruments coming into operation after December 31st, 1881, to exercise such powers, though not expressly given by the instruments of grant, and also, if thought advisable, to limit a term of years to secure the rentcharge. These statutory powers being given "to the

(*r*) See *ante*, p. 73 *et seq.*

(*s*) See Wms. Ex. (10th ed.), Vol. I., p. 619 *et seq.*

(*t*) A rentcharge issuing out of leaseholds is a chattel real (*Re Fraser*, [1904] 1 Ch. 726). Where a rent is granted without any clause of distress, it is a rent-seck to which at common law no distress was incident (Co. Lit. 144 a; Gilbert, Rents, 38; Noy's Maxims, 132), but the statute 4 Geo. 2, c. 28, s. 5, extended powers of distress to rents-seck.

(*u*) See *ante*, p. 81.

(*x*) 44 & 45 Vict. c. 41, s. 44.

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person entitled to receive the annual sum," will, under the Act of 1897 be exercisable by the personal representatives of a grantee dying on or after January 1st, 1898, as being the persons so entitled during the period of administration.

Bar of Statute of Limitations.

Upon the ground that a cause of action cannot exist unless there be a person in existence capable of suing, it is an established rule of law that time does not commence to run under the Statutes of Limitations against the estate of an intestate until the grant of letters of administration (*y*). Against the estate of a testator by whose will an executor capable of acting is appointed, time runs from the death, for such an executor, deriving his authority from the will and not from the probate, is a person in existence capable of suing on behalf of the estate. Where probate was granted of a forged will, and subsequently revoked and letters of administration granted, it was held that time commenced to run only from the date of the grant of letters of administration (*z*). On the other hand, where time has commenced to run against a person in his lifetime, it will continue to run against his estate after his death, whether he die testate or intestate (*a*).

Right to sue upon contracts made with himself.

With regard to the right of a representative to sue in his representative capacity upon contracts made with himself, the rule is that he may do so in any case where the money sued for, when recovered, would be assets (*b*).

Continuance of action by personal representative.

Where an action has already been commenced in the lifetime of the testator or intestate, provision is made

(*y*) *Murray* v. *East India Co.*, 5 B. & A. 214; *Chan Kit San* v. *Ho Fung Hang*, [1902] A. C. 257.

(*z*) *Chan Kit San* v. *Ho Fung Hang*, *supra*.

(*a*) *Penny* v. *Brice*, 18 C. B. (N.S.) 393; *cf. Garner* v. *Wingrove*, [1905] 2 Ch. 233.

(*b*) *Heath* v. *Chilton*, 12 M. & W. 632, 637; *Abbott* v. *Parfitt*, L. R. 6 Q. B. 346.

by the Rules of the Supreme Court for the continuance of the action by his personal representative.

Order 17, r. 1, provides that—

> "A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite;* and, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death."

The remaining rules of the Order prescribe the rights of the parties and the procedure to be adopted under such circumstances (*c*).

Privilege.

An objection to the production of documents on the ground of privilege, which might have been set up by a testator in his lifetime, may be sustained by his executors after his death (*d*).

SECTION II.

OF THE INTERIM MANAGEMENT OF THE PROPERTY OF THE DECEASED.

Period of management.

The period by law allowed to the personal representative within which to complete the administration of the deceased's estate, is limited in the absence of special circumstances, to one year from the death of the testator or intestate (*e*). But it may often happen that, owing to the complication of the affairs of the deceased, or for other reasons, a longer period will be found

(*c*) See, further, as to the continuance of actions, "The Yearly Practice of the Supreme Court" for 1908.

(*d*) *Bullivant* v. *Att.-Gen. for Victoria*, [1901] A. C. 196.

(*e*) See *post*, pp. 356, 394.

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necessary for the purpose. It therefore becomes necessary to consider what will be the powers of personal representatives as to management of the property and application of the rents and profits, while they retain possession and before a final distribution can be made.

How far the same rules applicable to representative and trustees.

The general rules by which a personal representative is to be guided in the management of the property of the deceased, pending a final distribution, are applicable alike to trustees and to executors and to all other persons upon whom is cast the custody of particular property, and who, of course, must have some reasonable power beyond the mere retention of the property as it passes through their hands (*f*).

Power of representatives limited by trust for sale.

It must be carefully borne in mind, however, that a personal representative is a trustee for the special purposes of administration (*g*), and that the primary duty incident to that trust is to sell within a reasonable time so much of the property devolving upon him as may be necessary for the purpose of paying the deceased's debts (*h*). It may often happen that some time must elapse before it can be determined that any sale will become necessary, or before a sale, though necessary, can be effected; and some acts of management will have to be performed in the *interim*. But the representative must do nothing in the course of management to retard the sale, or in any way conflict or interfere with the right of the creditors to receive payment of their debts. That is a right which cannot be controlled; and accordingly no directions contained in the deceased's will can justify an executor in disregarding it, nor relieve him from liability should he do so.

(*f*) *Strickland* v. *Symons*, 22 Ch. D. 666; affirmed 26 Ch. D. 245.

(*g*) *Ante*, p. 85.

(*h*) *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236, [C. A.].

Principle upon which powers of management are based.

The principle embodied in all the cases upon the subject is summarised by POLLOCK, B., as follows: "Wherever even an executor finds himself in possession of property which cannot be treated as so much specie in respect of which nothing can be done to improve it or keep it going, but finds himself in possession of a business, such as an ordinary shop, or factory, or anything else which requires essentially something to be done for it, there he must do that something, whatever it may be. A ship is a very good illustration of this principle. What would be said of a man who was executor of a shipowner, either part owner or whole owner, if he immediately sold the ship on the spot, without allowing a profitable voyage to be completed, or some expenditure upon the ship to take place in order to put her in a position to earn freight?" (*i*).

Application of principle to the case of continuing deceased's business.

In applying the above principle for the purpose of determining what a personal representative should do in regard to any trade or business carried on by the deceased in his lifetime, care must be taken to distinguish between "that something essential to be done" and the general carrying on of the business. Thus contracts should be completed, articles, in the course of construction, finished, and undertakings already commenced brought to a satisfactory conclusion (*k*), but the rule is well established that a personal representative cannot, safely upon his own initiative, and in a general manner, continue the business of the deceased, except so far as may be necessary for the purpose of selling the business as a going concern (*l*). The Court, moreover, in granting administration has no power to direct or control or suggest anything with

(*i*) *Strickland* v. *Symons*, 22 Ch. D. 666, at p. 671.

(*k*) *Marshall* v. *Broadhurst*, 1 Cr. & J. 403, 404. See *Strickland* v. *Symons*, *supra*.

(*l*) *Barker* v. *Parker*, 1 T. R. 295; *Ex parte Garland*, 10 Ves. 119; *Dowse* v. *Gorton*, [1891] A. C. 190, 199.

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regard to the administration of the property beyond granting administration in due course of law, and cannot give leave to an administrator to carry on a business in a particular way; but under special circumstances may dispense with sureties to the administrator's bond so as to give him a free hand with regard to the management of the property (*m*).

As against creditors.

As against creditors, where the estate is insolvent, an express direction in the will, authorising the carrying on of the business by the executors therein named will not better the position of the representative; for, as already observed, nothing in the will can affect the legal rights of creditors to payment out of the assets left by the testator (*n*). When, however, the business is continued with the consent of all the creditors (and acquiescence, in some circumstances, will amount to such consent (*o*)), the personal representative will be acting, so far as the creditors are concerned, as agent only, and will incur no personal liability for which he may not claim full indemnity out of the assets (*p*).

As against beneficiaries.

If the estate is cleared, or is clearly solvent apart from the business assets, the question of the representative's right to continue the business becomes one to be decided as between him and the persons beneficially entitled to the business assets, and in that case he will be justified in continuing the business in accordance with any express or implied power in that behalf contained in the will (*q*).

Management of land.

The position of the personal representative as regards the management of real estate devolving upon him

(*m*) *In the Goods of Cory*, [1903] P. 62.

(*n*) *Dowse* v. *Gorton*, [1891] A. C. 190, at p. 204; *Re Brooke, Brooke* v. *Brooke*, [1894] 2 Ch. 600.

(*o*) See *Re Brooke, Brooke* v. *Brooke, supra*.

(*p*) *Dowse* v. *Gorton, supra*, and see *post*, p. 437.

(*q*) *Re Chancellor, Chancellor* v. *Brown*, 26 Ch. D. 42 [C. A.]; *Re Crowther, Midgley* v. *Crowther*, [1895] 2 Ch. 56.

under the Land Transfer Act, 1897, until assent or conveyance to the persons beneficially entitled, is not as clearly defined as might have been expected. In the first place it is to be observed that, by s. 3 of the Act, power is given to the personal representative *at any time after the death of the owner* of any land, to assent to any devise contained in his will, or to convey the land to any person entitled thereto as heir, devisee, or otherwise, and to make the assent or conveyance, either subject to a charge for the payment of any money which the personal representative is liable to pay or without any such charge. Except, therefore, in the case of farming or mining land, where the business of farming or mining involves taking possession of the land, there would appear to be seldom any necessity for the personal representative, as such, to take upon himself the interim management of land, even though the estate of the deceased consisted chiefly of land. By virtue of the Act he has an estate in the land which is sufficient to enable him to deal with it so far as required for purposes of administration, but which falls short of full legal ownership as evidenced by possession (*r*). He is at liberty, no doubt, to enter upon and assume the management of the land, and thus invest himself with the ownership of a trustee and the responsibilities attaching thereto; but, unless an immediate sale for the purposes of administration is in contemplation, the personal representative will no doubt, in the majority of cases, take advantage of the power of assenting or conveying conferred by the third section of the Act, subject to the prescribed charge, before the necessity has arisen of doing any acts or entering into any contracts from personal liability in respect of which such an assent or conveyance, though made subject to the charge referred to, will not absolve him.

(*r*) See *ante*, p. 98.

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It will be seen that the power of the personal representative to assent to a devise or convey land to the person beneficially entitled, is subject to no exception on the ground of the infancy or other disability of the devisee or heir; the reason being, apparently, that an infant or person under disability could neither deal with the land to his detriment nor give a good discharge for the rents payable in respect thereof. Upon no such ground, therefore, can any necessity arise for the interim management of land by the personal representative as such. It may be added that as personal representative, he cannot, without the sanction of the Court, exercise the special powers of management conferred by s. 42 of the Conveyancing and Law of Property Act, 1881 (*s*); but where, in a recent case (*t*) an administrator, having cleared the estate of debts, held land upon trust for an infant heir, the Court, upon a formal disclaimer by the administratrix of "the office of trustee, whether by virtue of the Land Transfer Act, 1897, or otherwise," acceded to an application for the appointment of proper persons as trustees for the purposes of that section and of the Settled Land Acts.

Repairs, etc.

It is conceived that a personal representative who enters upon the land will, during his period of possession, like an ordinary trustee, be justified in laying out rents and profits in such repairs of existing buildings as are absolutely necessary for the preservation of the property from deterioration (*u*); and it would seem that he may cut timber on the land for the purpose of such repairs (*x*). But he will not, as a general rule, be allowed the costs incurred in lasting improvements (*y*),

(*s*) 44 & 45 Vict. c. 41.

(*t*) *Re Cowley*, [1901] 1 Ch. 38.

(*u*) *Caldecott* v. *Brown*, 2 Hare, 145; *Maclaren* v. *Stainton*, M. R., March 14th, 1866, not reported.

(*x*) Lewin on Trusts (11th ed.), pp. 697 *et seq.* See *Att.-Gen.* v. *Geary*, 3 Mer. 513.

(*y*) *Nairn* v. *Marjoribanks*, 3 Russ. 582.

Insurance.

or rebuilding (*z*), still less in repairs which are merely decorative (*a*). He will have, apparently, a discretionary power to insure any insurable property against loss or damage by fire unless the estate is clear, and the representative bound to convey absolutely to the persons beneficially entitled (*b*).

Cutting timber.

It would also seem that an executor or administrator being, during his period of possession, in the position of a trustee with a general control over the real estate, may cut decaying timber and sell it and apply the proceeds for the purposes of the trust (*c*) ; also that he may cut timber and underwood in the proper course of thinning plantations (*d*).

Mining property.

If the real or leasehold estate of a deceased person consists wholly or in part of land devoted to mining, and the mines have been worked by the deceased up to the time of his death, the personal representative appears to be placed in a position of considerable responsibility and difficulty, having regard to the fact that a mining undertaking is not as a general rule so readily saleable as an ordinary business.

It is clear that the continuance of the mining operations must fall within the principle enunciated by POLLOCK, B., in *Strickland* v. *Symons* (*e*) as being something "essentially required to be done," inasmuch as, by the shutting down of a mine in working order, the property would become exposed to rapid deterioration from natural causes.

(*z*) *Bleazard* v. *Whalley*, 2 Eq. Rep. 1093. See *Drake* v. *Trefusis*, L. R. 10 Ch. App. 364.

(*a*) *Bridge* v. *Brown*, 2 Y. & C. C. C. 181.

(*b*) 56 & 57 Vict. c. 53, s. 18 (1), (2).

(*c*) *Waldo* v. *Waldo*, 7 Sim. 261 ; 12 Sim. 107.

(*d*) *Cowley* v. *Wellesley*, 35 Beav. 638. See *Honywood* v. *Honywood*, L. R. 18 Eq. 306.

(*e*) 22 Ch. D. 666. See *ante*, p. 159.

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Where in a recent case the executor had, in 1892, commenced working a colliery belonging to the deceased's estate, and in so doing had become personally liable in damages to an adjoining owner, it was held in an action commenced in 1899 by the adjoining owner to recover damages out of the estate, that in the circumstances of the particular case, the damage done having been incurred in the ordinary and reasonable management of the colliery, the executor was entitled, as against creditors, to be indemnified out of the assets (*f*).

Powers of leasing.

The personal representative, having the legal estate in leaseholds, may in some cases underlet them (*g*); and by virtue of the Land Transfer Act, 1897 (*h*), he will now be in a position to exercise a similar power of leasing over the real estate to which that Act applies.

How far similar to those of trustee.

The power of a personal representative to grant leases unimpeachable by creditors appears to be precisely the same as that of an ordinary trustee holding property upon trust for sale within a reasonable time, but without any express power of leasing in the interim; for the personal representative is bound by the trust for sale for payment of debts which is incident to his office. On this point, JESSEL, M.R., observed as follows (*i*): "An administrator is considered in a Court of Equity as a trustee, and his primary duty is to sell the intestate's estate for the payment of his debts. It is quite true that, having the legal estate in the leaseholds, he may in some cases underlet them, and the underlease will be supported in equity as well as in law. But that is an exceptional mode of dealing with

(*f*) *Re Raybould, Raybould* v. *Turner*, [1900] 1 Ch. 199.

(*g*) Bac. Abr. (7th ed.), tit. Leases (I.), 7; *Hayes* v. *Sturges*, 7 Taunt. 217, and cases cited below.

(*h*) 60 & 61 Vict. c. 65, s. 2 (2).

(*i*) *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236, at p. 243 [C. A.]. See *Hackett* v. *M'Namara*, Ll. & G. *temp.* Plunk. 283.

the assets, and those who accept a title in that way must take it subject to the question whether it was the best way of administering the assets." As the Act of 1897 does not contain any express exemption of persons taking leases from personal representatives from such liability, it would seem that this rule will apply in such cases, so that leases by personal representatives will require justification, if challenged.

Where sale abortive.

The fact that property has been put up for sale but has found no purchaser, may in some circumstances be sufficient to justify a lease for twenty-one years at a fair rent (*k*).

Where possession vacant.

A personal representative, equally with other trustees to whom the sale of property is committed, but to whom no express power of leasing has been given, would appear, as a general rule, to be justified in granting leases of tenantable property so far as may be necessary for the purpose of filling up a vacant possession and preventing the property from remaining unproductive to the *cestuis que trustent* until sale (*l*). In *Fitzpatrick* v. *Waring* (*m*), it was said that a trustee who, in the discharge of his duties as such, is bound to receive the rents and profits of the property committed to his care may make a reasonable demise of it, but that the trustee or the person taking from him, must always be prepared to show, if challenged, that the demise in question was reasonable; and in that case a lease from year to year was confirmed.

Lease must be made in due course of management.

Even when the property leased proves not to be required for payment of debts and is consequently not subject to any trust for sale, it will be necessary, in order to substantiate the lease against beneficiaries

(*k*) *Oceanic Steam Navigation Co.* v. *Sutherberry*, *supra*. See *Evans* v. *Jackson*, 8 Sim. 217.

(*l*) *Keating* v. *Keating*, Ll. & G. *temp.* Sug. 133; *Oceanic Steam Navigation Co.* v. *Sutherberry*, *supra*, at p. 239 n.

(*m*) 11 L. R. Ir. 35, 45.

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seeking to set it aside, to show that it was granted in the fair management of the estate (*n*). Where in such circumstances the persons beneficially entitled had demanded a sale, a lease granted to a stranger with notice of the demand was set aside (*o*).

Option of purchase cannot be inserted.

An option of purchase, inserted in a lease by a personal representative, is inconsistent with, and tends to fetter, the due execution of the trust for sale by which the personal representative is bound, and will in no case be supported (*p*).

It would seem that a personal representative, if and so far as empowered to grant leases in his capacity of trustee, may let the property upon leases granted partly in consideration of a covenant by the lessee to do all repairs which may be necessary during the term (*q*).

Renewal of leases.

A personal representative is competent and compellable to grant (*r*) or renew (*s*) a lease pursuant to a covenant or agreement in that behalf made or entered into by the deceased owner in his lifetime.

Incorporeal hereditaments.

Much the same considerations would seem to apply to the exercise by the personal representative of rights incident to incorporeal hereditaments which, as real estate, devolve upon him by virtue of the Land Transfer Act, 1897 (*t*), as have already been applied to the exercise by the personal representative of rights of manage-

(*n*) *Att.-Gen.* v. *Owen*, 10 Ves. 560; *Fitzpatrick* v. *Waring*, 11 L. R. Ir. 35, 45, explaining *Naylor* v. *Arnett*, 1 Russ. & M. 501; *Wood* v. *Patteson*, 10 Beav. 541; *Re Shaw's Trusts*, L. R. 12 Eq. 124.

(*o*) *Drohan* v. *Drohan*, 1 Ball & B. 185.

(*p*) *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236 [C. A.].

(*q*) *Easton* v. *Pratt*, 2 H. & C. 676; *Truscott* v. *Diamond Rock Boring Co.*, 20 Ch. D. 251.

(*r*) *Davis* v. *Harford*, 22 Ch. D. 128. See *Snelling* v. *Thomas*, L. R. 17 Eq. 303.

(*s*) 56 & 57 Vict. c. 53, s. 19.

(*t*) 60 & 61 Vict. c. 65. See *ante*, p. 81.

ment in regard to land. All hereditaments, corporeal and incorporeal, are to be deemed land within the meaning of the Act (*u*), and it would seem, therefore, that at any time after the death of the owner of any incorporeal hereditament included within the expression "real estate," the personal representative may assent to any devise thereof contained in his will or convey the same in the appropriate manner to the persons beneficially entitled without the necessity of exercising any rights incident to the ownership of such hereditaments. Where, for instance, a manor forms part of the estate devolving upon him under the Act, it will not be incumbent on the personal representative, as such, unless an immediate sale of the manor for purposes of administration is contemplated, to exercise or enforce the various manorial rights, powers, and privileges, such as the demanding and recovering of heriots, fines, and rents, the holding of courts and the granting of leasing licenses to tenants of the manor.

Right of nomination to benefice during period of administration.

It seems doubtful whether the right of presentation to a vacant benefice, the vacancy having occurred after the death of the patron and during the time that the advowson is vested in the personal representative as real estate devolving upon him under the Act of 1897, is exerciseable by the personal representative at his absolute discretion without regard to any claim on the part of heir or devisee, as the case may be, to nominate to the vacancy.

On the one hand, it is provided by s. 2 (2) of the Act of 1897, that the powers, rights, duties and liabilities of personal representatives in respect of personal estate, shall apply to real estate, so far as the same are applicable, as if that real estate were a chattel real vesting in them or him; and it is to be observed that where

(*u*) Section 24 (1).

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formerly an advowson descended to the heir, the right of presentation to a vacancy occurring in the lifetime of the patron devolved as a chattel upon his personal representative and not upon the heir (*x*).

> "If one be seised of an advowson in fee, and the church doth become void, the void turn is a chattel; and if the patron dieth before he doth present, the avoidance doth not go to his heir, but to his executors; and if the testator do present, and (his clerk not being admitted) then his executors do present their clerk, the ordinary is at his election which clerk he will receive" (*y*).

On the other hand, it is provided by s. 2 (1) of the Act of 1897, that, subject to the powers, rights, duties, and liabilities referred to, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto. The position, therefore, of the personal representative in regard to an advowson and the right of presentation incident thereto forming part of the deceased's estate, appears closely to resemble that of a mortgagee and trustee in bankruptcy in regard to the same species of property forming part of the mortgage security or of the bankrupt's estate.

Mortgagor's right to nominate.

Where an advowson is in mortgage, the right to present is at law in the mortgagee as having the legal estate (*z*); but he is in equity compelled to present the nominee of the mortgagor, for the mortgagee can make no profit by presenting to the church to sink or lessen his debt, and the mortgagee therefore in that case, until the foreclosure, is in the position of a trustee for the mortgagor (*a*).

(*x*) *Rennell* v. *Bishop of Lincoln*, 7 B. & C. 113, 147, 170.

(*y*) Watson, Clergyman's Law, cc. 9, 11, 12; Burn. Eccl. Law (9th ed.), Vol. I., tit. Benefice (I. 5); Godolphin's Repertorium Canonicum, p. 257.

(*z*) *Dyer* v. *Craven*, 2 Dick. 662.

(*a*) *Jory* v. *Cox*, Pr. Ch. 71.

Bankrupt's right to nominate.

The analogy of the relations between a trustee in bankruptcy and the bankrupt appears to be even closer for the purposes of this question than those between mortgagor and mortgagee, inasmuch as a trustee in bankruptcy is trustee first for the creditors, and, subject to the satisfaction of their claims, for the bankrupt. It has long been settled under the former bankruptcy law that if a bankrupt were the patron of an advowson, it would pass to his assignee, who might sell it at any time, except when vacant, in the ordinary way, but that if a vacancy occurred before the advowson was sold, the bankrupt, and not the assignee, should present, because the void turn of a church is not valuable (*b*). This rule has since been affirmed by statute (*c*).

(*b*) Burn. Eccl. Law (9th ed.), Vol. I., tit. Benefice (I. 4). See *Ex parte Meymot*, 1 Atk. 196.

(*c*) 12 & 13 Vict. c. 106, s. 147 ; 46 & 47 Vict. c. 52, s. 44 (2).

CHAPTER VIII.

OF THE REALISATION OF ASSETS.

SECTION I.

GENERALLY.

Necessity of sale.

REALISATION of the assets is, in many cases, indispensable to the attainment of the ultimate object of the administration, viz., the payment of the debts of the deceased and the distribution of the residue of the property, after payment of debts, among the persons by law entitled to the enjoyment of it.

Representative's power of sale under old law.

Although at common law the personal representative has abundant power of alienation, for this purpose, over personalty vesting in him by virtue of his common law office, his power of alienation over the deceased's real estate was, until the date of the coming into operation of the Land Transfer Act, 1897 (*a*), such only as was expressly or implied conferred upon him by the will of his testator. Apart from any directions contained in the will, the real estate of a deceased owner, devised or allowed to descend, became subject to the control of the devisee or heir to the exclusion of the personal representative, and it followed that recourse to the jurisdiction of the Court for the purpose of having the real estate applied in payment of debts, was frequently necessary.

Land Transfer Act, 1897.

The Land Transfer Act, 1897 (*a*), confers upon the personal representatives or representative for the time being of a person dying after December 31st, 1897,

(*a*) 60 & 61 Vict. c. 65, s. 25.

power to deal with all real estate devolving upon them by virtue of that Act (*b*) in a due course of administration as if that real estate were a chattel real vesting in them or him, with the single qualification that the power of selling or transferring real estate is not to be exerciseable, without the authority of the Court, by some or one only of several joint personal representatives. The extent of this qualification is discussed later. Speaking generally, however, it may be stated that the effect of the Act is to enable the realisation and administration in payment of debts of all real estate other than lands of copyhold tenure, of which the deceased owner died tenant on the Court Rolls, to be effected out of Court by the personal representative without let or hindrance from either heir or devisee, as freely as if it were personal estate.

SECTION II.

OF THE SALE OR MORTGAGE OF PERSONAL ESTATE.

Sale of personal estate by representative.

The personal representative holds the personal estate and effects of his testator or intestate in trust for sale so far as necessary for the payment of his debts (*c*) and the costs of administration (*d*). He is consequently enabled to make a good title to an alienee, notwithstanding the property aliened be specifically bequeathed (*e*) or limited in trust (*f*) by the will, and the property aliened cannot be followed into the hands

(*b*) See *ante*, pp. 71 *et seq.*

(*c*) *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236 [C. A.].

(*d*) *Re Whistler*, 35 Ch. D. 561, 566; *Re Verrell's Contract*, [1903] 1 Ch. 65, 69. See *Re O'Donnell's Estate*, [1905] 1 I. R. 406 [C. A.].

(*e*) *Ewer* v. *Corbet*, 2 P. Wms. 149; *Burting* v. *Stonard*, *ibid.*, 150; *Langley* v. *Earl of Oxford*, Amb. 17; *Andrew* v. *Wrigley*, 4 Bro. C. C. 125; *Hill* v. *Simpson*, 7 Ves. 152, 166.

(*f*) *M'Leod* v. *Drummond*, 17 Ves. 152, 161; *Graham* v. *Drummond*, [1896] 1 Ch. 968.

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of the alienee by either legatee (*g*) or creditor (*h*), except upon a voluntary alienation by collusion with the personal representative (*i*). In case of misapplication of the money, the creditor or legatee has no remedy against the purchaser, but only against the personal representative (*k*).

Mortgage of personal estate by representative for purposes of administration.

Notwithstanding some early expressions of contrary opinion (*l*), it is now well settled that the personal representative, having full and absolute power of disposal by way of sale over the personal effects of the deceased, may raise money required for purposes of administration by way of pledge or mortgage of such assets (*m*). Further, it has been decided, that as the personal representative may mortgage this portion of the assets to a stranger in order to raise money to pay a creditor, so, in the absence of fraud, he may mortgage the same assets to the creditor himself in order that he may pay himself (*n*). The purposes of administration for which, if required, money may be thus raised include, in addition to the payment of debts, the payment of costs properly incurred in the administration (*o*); and in a recent case (*p*) before the Court of Appeal in Ireland it was held that payment to one of the next-of-kin was one of the purposes of administra-

(*g*) *Whale* v. *Booth*, 4 T. R. 625 n. See *Spackman* v. *Timbrell*, 8 Sim. 260; *Dilkes* v. *Broadmead*, 2 De G. F. J. 566.

(*h*) *Nugent* v. *Gifford*, 1 Atk. 463; *Elliot* v. *Merriman*, 2 Atk. 41; *Graham* v. *Drummond*, [1896] 1 Ch. 968.

(*i*) *Earl Vane* v. *Rigden*, 5 Ch. App. 663, 668.

(*k*) *Ewer* v. *Corbett*, 2 P. Wms. 149.

(*l*) *Andrew* v. *Wrigley*, 4 Bro. C. C. 138.

(*m*) *Mead* v. *Lord Orrery*, 3 Atk. 239; *Scott* v. *Tyler*, 2 Dick. 725; *Russell* v. *Plaice*, 18 Beav. 21; *M'Leod* v. *Drummond*, 17 Ves. 154. See *Farhall* v. *Farhall*, L. R. 7 Ch. App. 123; *Re Cooper, Cooper* v. *Vesey*, 20 Ch. D. 611 [C. A.].

(*n*) *Earl Vane* v. *Rigden*, 5 Ch. A. 663. See *Berry* v. *Gibbons*, L. R. 8 Ch. App. 747.

(*o*) *Re Whistler*, 35 Ch. D. 561, 566; *Re Verrell's Contract*, [1903] 1 Ch. 65, 69.

(*p*) *Re O'Donnell's Estate*, [1905] 1 I. R. 406 [C. A.].

tion, and the Court accordingly upheld a mortgage made partly for that purpose and partly for the payment of debts.

Mortgage with power of sale.

A personal representative may legally effect a mortgage with power of sale; and a valid title may be obtained by a purchaser from the mortgagee upon a sale under such power (*q*).

Effect of assent upon title of alienee.

It has been said that a sale or mortgage of personal property made by the personal representative to a stranger cannot, in the absence of collusion, be impeached by a specific legatee of the property aliened, and the proposition would appear to be strictly true, notwithstanding that the personal representative may have assented to the legacy prior to the completion of the sale or mortgage. The effect of an assent is no doubt to pass to the specific legatee the legal interest in the legacy assented to (*r*), which will not be divested by a subsequent sale by the personal representative; but the legacy is not, by reason only of such assent, withdrawn from the trust for creditors to which it is subject in the hands of the personal representative, and may still be rendered available for debts at the suit of creditors provided other equities have not arisen in the meanwhile (*s*).

Advisability of obtaining concurrence of legatee on sale of specific legacy.

Where, however, the specific legatee has parted with the legacy to a purchaser for value without notice, the purchaser from the legatee will take it discharged from the trust for creditors (*t*). It would therefore seem to be advisable, upon a sale or mortgage from a personal representative of specifically bequeathed or devised

(*q*) *Cruikshank* v. *Duffin*, L. R. 13 Eq. 555. See *Thorne* v. *Thorne*, [1893] 3 Ch. 196.

(*r*) *Doe* v. *Guy*, 3 East, 120, citing *Chamberlain* v. *Chamberlain*, 1 Ch. Cas. 256; and see *post*, p. 409.

(*s*) *Blake* v. *Gale*, 32 Ch. D. 571; *Leahy* v. *De Moleyns*, [1896] 1 I. R. 206.

(*t*) *Chamberlain* v. *Chamberlain*, 1 Ch. Ca. 256.

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property, in all cases to require the concurrence, if possible, of the specific legatee or devisee.

Concurrence of specific legatee cannot be enforced under open contract.

But it is to be observed that a purchaser will not generally be entitled, apart from condition, to demand such concurrence as of right; for in the absence of any evidence to the contrary, a personal representative dealing as such, with the personal property of the deceased, must be assumed to be acting in the due execution of his trust notwithstanding the lapse of time, sufficient, in the case of a sale by him under a power of sale contained in the will, to raise the presumption that the power is at an end (*u*). So where a testator bequeathed leaseholds to his executrix upon trust to pay an annuity, and bequeathed his residuary estate to the executrix; and the latter having contracted to sell the leaseholds, the purchaser demanded the concurrence of the annuitant in the assignment, it was held by KAY, J., that the requisition could not be supported. The learned judge concluded his judgment as follows: "Of course there may be cases where an executor is plainly . . . selling property which is actually in the possession of a legatee, so that it is apparent that the bequest has been assented to, and in those cases it may be quite right to make such a requisition as was made here. But in this case I do not think the requisition can be supported, and I think the title is a perfectly good one" (*x*).

Fraud.

Fraud or collusion with the personal representative will, of course, vitiate any transaction of sale or mortgage (*y*). And although the application of the

(*u*) *M'Leod* v. *Drummond*, 17 Ves. 154; *Charlton* v. *Durham*, L. R. 4 Ch. App. 433; *Re Whistler*, 35 Ch. D. 561; *Re Venn and Furze's Contract*, [1894] 2 Ch. 101.

(*x*) *Re Whistler*, *supra*, at p. 567.

(*y*) *Earl Vane* v. *Rigden*, L. R. 5 Ch. App. 663, 668. See *Scott* v. *Tyler*, 2 Dick. 712; *Rice* v. *Gordon*, 11 Beav. 265.

purchase or mortgage money is, in general, no concern of the purchaser or mortgagee (*z*), yet, "if the nature of the transaction affords intrinsic evidence that the executor, in the mortgage or sale, is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from the executor to the mortgagee or purchaser, there such mortgagee or purchaser, being a party to the breach of trust, does not hold the property discharged from the trusts, but equally subject to the payment of debts and legacies as it would have been in the hands of the executor" (*a*).

Notice.

So where a mortgagee is shown to have had actual or constructive notice that the money he advances cannot be required for purposes incident to the administration of the estate, his charge will be disallowed (*b*); and where an executrix, after a lapse of eighteen years from the death of the testator, had contracted as executrix for the sale of leaseholds bequeathed to herself for life, and after her death to her son, but the purchaser being informed by her solicitors that there were no debts of the testator remaining unpaid, refused to complete unless the concurrence of the son were obtained, KEKEWICH, J., upon a summons taken out by the purchaser asking for a declaration that the vendor had no power to sell, decided that the title was not one which ought to be forced upon the purchaser, observing that it was admitted that there were no debts, and it was not suggested that there was any other reason for selling (*c*).

(*z*) *Scott* v. *Tyler*, 2 Dick. 712; *M'Leod* v. *Drummond*, 17 Ves. 154; and see 56 & 57 Vict. c. 53, s. 20.

(*a*) *Watkins* v. *Cheek*, 2 S. & S. 199, at p. 205. See *Hill* v. *Simpson*, 7 Ves. 152.

(*b*) *Ricketts* v. *Lewis*, 20 Ch. D. 745. See *Re Cooper*, *Cooper* v. *Vesey*, 20 Ch. D. 611 [C. A.].

(*c*) *Re Verrell's Contract*, [1903] 1 Ch. 65.

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One of several representatives can assign personal estate.

From what has already been said as to the estate of each of several co-executors or co-administrators (*d*), it follows that, as a general rule, an assignment of personalty by way of sale or mortgage may be safely taken from one only of two or more joint personal representatives.

Except in case of shares in company under Companies Clauses Act, 1845.

The transfer of shares in a company under the Companies Clauses Consolidation Act, 1845 (*e*), forms an exception to the above rule. In order to perform any contract they may make for the sale of such shares, the representatives must themselves be registered under s. 18 of the Act, and directly they are so registered they become shareholders subject to the liabilities and entitled to the rights of such; and consequently the shares can only be transferred by means of a transfer executed by all of them (*f*). The same rule would seem to apply in the case of shares of a joint stock company registered under the Companies Acts where the representatives have taken steps to constitute themselves legal owners of the shares (*g*).

SECTION III.

OF THE SALE OR MORTGAGE OF REAL ESTATE UNDER THE OLD LAW.

Date of operation of Land Transfer Act, 1897.

Inasmuch as the Land Transfer Act, 1897, applies only in cases of death after the commencement of the Act (*h*), and does not affect the devolution of land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the

(*d*) See cases cited *ante*, pp. 13, 14.

(*e*) 8 & 9 Vict. c. 16.

(*f*) See *per* Lord ESHER, M.R., in *Barton* v. *London and North Western Rail. Co.*, 24 Q. B. D. 77, 87 [C. A.].

(*g*) See *ante*, p. 94.

(*h*) Section 1 (5).

customary tenant (*i*), it will be convenient in this place briefly to state in what cases personal representatives have hitherto been able effectually to convey freehold lands of a testator or intestate by way of sale or mortgage.

Express powers and trusts for sale.

The powers of executors to sell real estate arose either under common law powers in wills, or under powers attached to an interest given to them by wills. Thus, a direction that the executors should sell, or that the land should be sold by the executors, gave them only a common law power; but a devise to the executors in trust to sell, vested the estate in them with the powers of dealing with the same necessary for the performance of their trust (*k*). Between a common law power of sale, which is but a bare trust, and a devise to executors in trust to sell, which is a trust coupled with an interest, there was originally this difference, that in the former case, the executors having but a power to sell, they must all have joined in the sale, and if one died, the survivors could not sell; but in the latter case, upon the death of one executor, the survivors might sell, because as the estate survived, the trust also survived (*l*).

By a statute passed in the reign of Henry VIII. (*m*), it was in effect provided that where lands are willed to be sold by executors, that though part of them refuse, yet the residue may sell. "And albeit the letter of the law extendeth only where executors have a power to sell, yet being a beneficial law, it is by construction extended where lands are devised to executors to be sold. In neither of these cases," Lord COKE continues, "albeit one refuse, can the other make sale to

(*i*) Section 1 (4).

(*k*) Sugd. Pow. (8th ed.), 111, 115. See Co. Lit. 113 a; *Doe* v. *Shotter*, 8 A. & E. 905; *R.* v. *Wilson*, 9 Jur. (N.S.) 439.

(*l*) Co. Lit. 112 b, 113 a.

(*m*) 21 Hen. 8, c. 4. See *Boniface* v. *Greenfield*, Cro. Eliz. 80. See also 45 & 46 Vict. c. 39, s. 6; *Re Fisher and Haslett*, 13 L. R. Ir. 546.

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him that refused, because he is party and privy to the last will, and remains executor still" (*n*). It is to be observed that in the above passage it is assumed that the statute gave power to the acting executors to sell, notwithstanding that some other person might, in fact, remain executor, and this view is supported by the decisions on the statute (*o*). The explanation appears to be that a sale by executors, either by virtue of a common law power of sale or of a devise to them in trust for sale, was regarded as a sale by them in their capacity as trustees, and that although a disclaimer by one of several executors and trustees who had not acted in the trust effectually absolved him from the performance of the trust, he remained executor until he had renounced by matter of record.

A sale by executors under a common law power of sale was effectual to pass the legal estate to the purchaser (*p*).

Implied powers of sale by charge of debts.

Executors could also sell and give a good discharge for the purchase-money where the real estate was charged by the will expressly or by implication with payment of the testator's debts or legacies, or both (*q*). This power of sale was, however, merely equitable, so that, independently of statutory enactment, executors selling thereunder could not pass the legal estate to a purchaser (*r*); but it seems that the executors could compel the persons in whom the legal estate was vested to join in the conveyance for the purpose of passing such estate (*s*). A general charge of debts and

(*n*) Co. Lit. 113 a.

(*o*) *Adams* v. *Taunton*, 5 Madd. 435; *Peppercorn* v. *Wayman*, 5 De G. & Sm. 230.

(*p*) *Warneford* v. *Thompson*, 3 Ves. 513.

(*q*) *Elliott* v. *Merriman*, 2 Atk. 41; *Stroughill* v. *Anstey*, 1 De G. M. & G. 635; *Robinson* v. *Lowater*, 5 De G. M. & G. 272. As to charges by will of debts and legacies upon real estate, see *post*, Chaps. XIV., XVI.

(*r*) *Doe* v. *Hughes*, 6 Exch. 223; *Kenrick* v. *Lord Beauclerk*, 3 B. & P. 175; *Shaw* v. *Bonner*, 1 Keen, 576.

(*s*) *Hodgkinson* v. *Quinn*, 1 John. & H. 303.

legacies on real estate extends to lands specifically devised (*t*), but a charge of legacies only is restricted to residue (*u*), and will not charge real estate specifically devised, notwithstanding that there is no residuary real estate (*x*).

Devise to trustees with charge of debts.

Where real estate was devised to trustees subject to a charge of debts, the power of the executors to sell was ousted, and the trustees were the proper persons to sell and convey, and also to receive and give receipts for the purchase-money (*y*).

Power of executors to mortgage land.

Where executors had an implied power of sale over real estate by virtue of a trust or charge for payment of debts or otherwise, it was held that such a power included a power to mortgage, a mortgage being a conditional sale (*z*); unless, indeed, there was a direction to sell so worded as to show that the testator's intention was to create a complete conversion (*a*).

Restrictions on powers to sell or mortgage.

A trust, power, or direction to sell or mortgage for payment of debts or legacies might formerly have been imposed or given subject to restrictions, as that recourse should not be had to the real estate unless the personalty should prove insufficient for such payments, in which case, if the personal estate was sufficient, the purchaser or mortgagee took nothing (*b*); or that estates devised for payment of debts, etc., should be sold or mortgaged in a particular order (*c*).

(*t*) *Mannox* v. *Greener*, L. R. 14 Eq. 456.

(*u*) *Conron* v. *Conron*, 7 H. L. Cas. 168.

(*x*) *Bank of Ireland* v. *McCarthy*, [1898] A. C. 181. See *post*, p. 327.

(*y*) *Shaw* v. *Borrer*, 1 Keen, 559; *Stroughill* v. *Anstey*, 1 De G. M. & G. 647; *Colyer* v. *Finch*, 5 H. L. Cas. 905.

(*z*) *Mills* v. *Banks*, 3 P. Wms. 9; *Ball* v. *Harris*, 4 My. & C. 264; *Page* v. *Cooper*, 16 Beav. 396; *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591; *Balfour* v. *Cooper*, 23 Ch. D. 472.

(*a*) *Holdenby* v. *Spofforth*, 1 Beav. 390.

(*b*) *Dike* v. *Ricks*, Cro. Car. 335. See *Greetham* v. *Colton*, 34 Beav. 615.

(*c*) *Pierce* v. *Scott*, 1 You. & Coll. Ex. 257.

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Powers of executors under Lord St. Leonard's Act.

In order to obviate difficulties which arose as to the power of trustees or executors to sell or mortgage realty by virtue of a charge of debts, etc., it was in substance enacted by s. 14 of Lord St. Leonard's Act that where there is a charge of debts, or of a legacy, or of any specific sum of money, on real estate, and the estate so charged is devised to a trustee or trustees for the whole of the testator's estate or interest therein, and there is an express provision made for raising the charge, the trustee or trustees may, notwithstanding any express trusts, raise the money required for payment of the debts, legacy, or specific sum by sale or mortgage of the estate so charged (*d*). By s. 16, the same powers are given to executors, where there is no devise in trust. Both of the above sections are, however, limited in their application by s. 18 of the Act, which provides that the preceding ss. 14, 15, and 16 "shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do." The word "devise" in this section does not mean a particular estate or a number of particular estates followed by a remainder in fee; it means a devise in fee or in tail to a single person or to a number of persons as joint tenants or tenants in common; and the words "any such devisee or devisees" mean devisees who take on the death of the testator, by virtue of his will, an estate in fee or in tail then devised to them (*e*). Where, therefore, a testator charged his real estate with the payment of debts and legacies, and devised his real estate in fee to his first son who should attain the age of twenty-five years, it was held that this was

(*d*) 22 & 23 Vict. c. 35.

(*e*) *Re Wilson*, 54 L. T. 600; *Re Barrow-in-Furness Corporation and Rawlinson's Contract*, [1903] 1 Ch. 339.

not a devise within the meaning of s. 18, and that the executrix could exercise the power of sale conferred by s. 16 (*f*). The last-mentioned section seems impliedly to enable executors selling to convey the legal estate if vested in the testator at his death by enacting that a sale under the Act "shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate" (*g*). This statutory power of sale is not exerciseable by an administrator with the will annexed (*h*).

Sale by Court where no power of sale in executors.

In cases where the executors had no power to sell real estate, express or implied, it could only be made available for payment of the debts of a deceased owner by invoking the aid of the Court in an administration action.

Courts of Equity in exercise of their ancillary jurisdiction would, at the suit of a creditor by specialty in which the heirs were bound, order the sale of such real estate as was assets by descent in the hands of the heir or devisee (*i*); but if such assets had been aliened by the heir or devisee before action brought, the Court could not disturb the title of the alienee for value (*j*), but would leave the creditor to his remedy against the heir or devisee who had become answerable by statute to the value of the lands aliened (*k*).

Statute 3 & 4 Will. 4, c. 104.

The statute 3 & 4 Will. 4, c. 104, extended the jurisdiction of the Court to the granting of the like relief at

(*f*) *Re Barrow-in-Furness Corporation and Rawlinson's Contract, supra.*

(*g*) See Lewin on Trusts (11th ed.), p. 544.

(*h*) *Re Clay and Tetley*, 16 Ch. D. 3.

(*i*) *Robinson* v. *Tonge*, 3 P. Wms. 401; *Pimm* v. *Insall*, 1 Mac. & G. 449.

(*j*) *Spackman* v. *Timbrell*, 8 Sim. 253; *Richardson* v. *Horton*, 7 Beav. 112. See *Coope* v. *Cresswell*, L. R. 2 Ch. App. 112.

(*k*) 3 & 4 Will. & M., c. 14, s. 5; 47 Geo. 3, c. 74, sess. 2; 11 Geo. 4 & 1 Will. 4, c. 47, s. 6.

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the suit of any creditor in respect of all real estate which was not, by the will of the deceased owner, charged with or devised subject to the payment of his debts.

Jurisdiction under above statute.

In the exercise of the jurisdiction conferred by this statute the Court has acted upon the analogy of the former law as to the right of creditors to follow the assets of the deceased, and has refused to grant relief to the prejudice of third persons who, prior to the relief claimed, have acquired a legal or equitable title to the property by alienation from the heir or devisee (*l*).

The effect of the statute may be shortly stated to have been to create an immediate general charge upon the realty of the debts of the deceased, which general charge had priority over other general charges created by judgments entered up against the heir or devisee (*m*), but was subject to be postponed in favour of specific charges or alienations effected by the heir or devisee (*n*), for, as against such specific alienations, the charge of debts created by the statute was considered as an inchoate, rather than an actual, charge, until decree for administration had been obtained (*o*). Where, however, the real estate sought to be charged by the creditor's suit was sufficiently indicated, and the specific devisee was a defendant, then, unless the specific devisee was in such a position that the purchaser or mortgagee from him, had a right to suppose that he was selling or mortgaging for the purpose of paying the testator's debts (*p*), a registered creditor's suit was

(*l*) *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. App. 567.

(*m*) *Hamer's Devisees' Case*, 2 De G. M. & G. 366 ; *Kinderley* v. *Jervis*, 22 Beav. 1, 22.

(*n*) *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. App. 567, overruling *Carter* v. *Sanders*, 2 Drew. 248.

(*o*) *Price* v. *Price*, 35 Ch. D. 297, 305 ; *Re Moon, Holmes* v. *Holmes*, [1907] 2 Ch. 304.

(*p*) *Walker* v. *Flamstead*, 2 Keny., Part 2, p. 57.

a sufficient *lis pendens*, before final decree, to entitle the creditor to priority over a purchaser or mortgagee from the specific devisee after such registration (*q*).

Order for sale in case of disability.

By one of the earlier Statutes of Fraudulent Devises (*r*), it was provided that if in any suit in equity for payment of debts to which the heir or devisee was liable, a Court of Equity should decree the estates liable to such debts to be sold for their satisfaction; and by reason of the infancy of the heir, an immediate conveyance could not be compelled, the Court should direct, and, if necessary, compel the infant to convey the same, and every such conveyance was rendered as effectual as if the infant had then been of age. And it was further provided (*s*) that where lands had been devised in settlement by any person whose estate under that Act or by law or by will was liable to the payment of debts, it should be lawful under similar circumstances for the Court to direct a conveyance to be made by a limited owner; and that such conveyance should be as effectual as if made by a person entitled to the fee simple. By a later statute authority was given to the Court to direct mortgages as well as sales by infants and limited owners, although also infants (*t*); and notwithstanding that there was an executory devise over in favour of a person or persons not existing or not ascertained (*u*).

And now by the Trustee Act, 1893 (*x*), as amended by the Trustee Act, 1893, Amendment Act, 1894 (*y*), it is provided that:

Vesting order consequential on judgment for sale or mortgage of land.

"Where any Court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein and is a party

(*q*) *Price* v. *Price*, *supra*.
(*r*) 11 Geo. 4 & 1 Will. 4, c. 47, s. 11.
(*s*) Section 12.
(*t*) 2 & 3 Vict. c. 60.
(*u*) 11 & 12 Vict. c. 87.
(*x*) 56 & 57 Vict. c. 53, s. 30.
(*y*) 57 Vict. c. 10, s. 1.

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to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act; and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as that Court thinks fit in the purchaser or mortgagee or in any other person."

SECTION IV.

OF THE SALE OR MORTGAGE OF REAL ESTATE UNDER THE PRESENT LAW.

Statutory powers of personal representatives to sell or mortgage real estate.

The Land Transfer Act, 1897 (*z*), by vesting in the personal representatives of a deceased person dying on or after January 1st, 1898, all his real estate, except copyholds and customary freeholds, of which he was at the date of his death tenant on the Court Rolls, and by giving to them similar powers of disposal over such real estate, as they have hitherto had over chattels real, will enable them, without any application to the Court by themselves or by creditors, in their absolute discretion to sell such real estate, or any part thereof, and to effectually convey the legal estate, if vested in the deceased owner at the time of his death, without the concurrence of the devisee or heir, or to mortgage the estate either by way of legal mortgage (*a*) or equitable charge, and that either by actual conveyance or by deposit of deeds (*b*). And it will make no difference in the exercise of the powers of personal representatives to sell or mortgage real estate, as between themselves and a purchaser or mortgagee, whether or not there is a trust or direction for payment of debts or legacies out of the real estate, or a charge of debts

(*z*) 60 & 61 Vict. c. 65.
(*a*) *Ball* v. *Harris*, 4 My. & C. 264.
(*b*) *Scott* v. *Tyler*, 2 Dick. 724.

or legacies thereon, or in what terms any such trust, direction, or power may be expressed; and any attempt to impose restrictions or conditions on such discretion will be nugatory.

As to copyholds and customary lands

Inasmuch as copyholds and customary lands, a perfect legal title to which cannot be obtained without admission, are excepted from the operation of the Act of 1897 (*c*), it follows that the powers of the executors or administrators of a deceased owner of such lands to sell or mortgage the same will depend upon the old rules of law as laid down by judicial decision or statutory enactment with regard to such powers. And where there are no such powers, express or implied, an administration action must be brought in order to raise money for payment of debts by sale or mortgage of copyhold or customary lands.

Where a testator authorises or directs his executors to sell copyholds, the proper mode of conveyance by them is by deed of bargain and sale, and the appointee under such a deed may claim thereunder to be admitted, and one fine only is payable upon the admission; for the appointee takes immediately under the will (*d*), and if the sale is made in good time before the lord is entitled to seize *quousque*, he cannot refuse to admit as tenant the appointee of the executors (*e*). The legal estate, until sale by the executors in such a case, vests in the customary heir, and if he chooses to be admitted, he must pay his own fine.

Sale of real estate specifically devised.

Although the Land Transfer Act, 1897, empowers the executor of a deceased person to sell or mortgage freehold real estate, whether specifically devised or not, yet, in the former case, lest the executor should

(*c*) *Ante*, p. 81.

(*d*) *Holder* v. *Preston*, 2 Wils. 400. See Watk. Cop. (4th ed.) 105, 127, 334, 353.

(*e*) *Holder* v. *Preston*, *supra*.

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have assented to the devise, the purchaser or mortgagee should, if possible, require the concurrence of the devisee (*f*).

Purchaser whether entitled to inquire if debts are paid.

In the case of a sale or mortgage of real estate by an executor in exercise of a power conferred by the will, it was a general rule that the purchaser or mortgagee was not bound or entitled to enquire whether there were in fact debts remaining unpaid, unless twenty years had elapsed since the testator's death; in which later case the presumption arose that the power was at an end, and the purchaser or mortgagee was put upon inquiry (*g*).

But where real estate is sold by the personal representative in exercise of the power conferred upon him by the Land Transfer Act, 1897, it would seem that the purchaser or mortgagee will, in this respect, be in the position of a purchaser or mortgagee of leaseholds (*h*).

All representatives must join in conveyance.

The power of the personal representative to sell or mortgage real estate under the Act appears to be co-extensive with the power which he has always had, of selling or mortgaging personal estate (*i*), subject, however, to the saving clause contained in sub-s. (2) of the second section of the Act, viz.: "that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate."

Joint personal representatives.

By "joint" personal representatives appears to be meant all personal representatives upon whom real estate devolves by virtue of the Act, in other words joint real representatives. It has already been pointed

(*f*) See *ante*, p. 173.

(*g*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465 [C. A.].

(*h*) *Ante*, p. 174. See *Corser* v. *Cartwright*, L. R. 7 H. L. 731; *Re Whistler*, 35 Ch. D. 561, 566.

(*i*) *Ante*, pp. 171 *et seq.*

out that not every personal representative is also real representative, as is the case, for instance, where special executors are appointed in whom chattels real (if the testator had any) would not vest (*k*). But for this exception all persons in whom the representation to the testator continues for the time being (*l*) are apparently joint personal representatives within the meaning of the saving clause. Where, therefore, one or more of several executors alone prove the will, and power is reserved for the other or others to prove, a purchaser cannot safely take a conveyance from the proving executors or executor (*m*). There is nothing in the Probate Act or the Probate Amendment Act to show that an executor to whom power has been reserved to prove at a future time, is for that reason any the less to be considered as an executor. The Land Transfer Act, 1897, expressly requires the concurrence of all the personal representatives; and by s. 24 the expression "personal representative" is defined as meaning "executor or administrator," not, be it observed, "proving executor." It should further be observed that the executor's common law power of sale, taking effect, as it does, as a testamentary disposition (*n*) must be subject to the power of sale for the purposes of administration conferred by the Act, and that the authority conferred by the statute of Henry VIII. already referred to (*o*) upon acting executors to exercise the power must be regarded as revoked during the period of administration, so far, at any rate, as it enables some or one only of several joint personal representatives to sell or transfer real estate.

Acting executors.

(*k*) *Re Cohen's Executors and the London County Council*, [1902] 1 Ch. 187; and see *ante*, p. 10; p. 28, note (*c*).

(*l*) *Ante*, p. 11.

(*m*) *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58.

(*n*) *Ante*, p. 125, note (*e*).

(*o*) *Ante*, p. 177.

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Married women.

By s. 18 of the Married Women's Property Act, 1882 (*p*), power is expressly given to a married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, to transfer funds standing in the name of such person. This section, however, does not extend to real estate, and apparently a married woman is still unable to convey to a purchaser real estate vested in her as executrix or administratrix, except with the concurrence of her husband and by deed acknowledged (*q*).

Personal representatives being trustees for sale within the meaning of the Trustee Act, 1893 (*r*), will have the auxiliary powers given by that Act, which are as follows:

Power of trustee for sale to sell by auction, etc.

Section 13.—"(1) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

"(2) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained."

The personal representatives, in exercising their power of sale, must pay due regard to the purposes of their trust and the interests of the persons interested thereunder. The Court will not enforce specific performance of a contract which, on the face of it, shows

(*p*) 45 & 46 Vict. c. 75.

(*q*) See *Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358. *Cf. Re Brooke and Fremlin's Contract*, [1898] 1 Ch. 647; *Re Howgate and Osborn's Contract*, [1902] 1 Ch. 451; *Re West and Hardy's Contract*, [1904] 1 Ch. 145.

(*r*) 56 & 57 Vict. c. 53, s. 50.

that those interests are being prejudiced, thereby involving a breach of trust (*s*).

Sale of land and timber separately.

Although s. 13 of the Trustee Act, 1893, authorises a sale of "all or any part of the property," the estate and the timber thereon cannot be sold separately (*t*) except with the sanction of the Court (*u*).

Sale of mines and surface separately.

The same rule applies to a sale of the surface of land apart from the mines and minerals thereunder (*v*); but by s. 44 of the Trustee Act, 1893, the Court has power to sanction a sale by trustees of land or mines and minerals separately from each other.

Sale free from incumbrances.

By virtue of s. 5 of the Conveyancing and Law of Property Act, 1881 (*w*), where real estate is subject to prior charges, personal representatives desiring to sell the same may apply to the Court for an order directing payment out of the general estate of such a sum as, when invested in Government securities, will be sufficient to provide for the charges and the contingency of further expenses and the conveyance of the land free from such charges.

Mode of sale

Personal representatives as trustees should use their discretion as to the mode of sale, whether by public auction or private contract, so as to endeavour to sell to the best advantage (*x*). They should cause a valuation to be made by a competent surveyor or valuer so as to guide them as to what is a proper price for them to accept (*y*).

Sales under depreciatory conditions.

As regards sales under depreciatory conditions, trustees have always been allowed a fair discretion,

(*s*) *Wood* v. *Richardson*, 4 Beav. 176; *White* v. *Cuddon*, 8 Cl. & F 788. See also cases cited Byth & Jarm. Conv. (4th ed.), Vol. II., p. 729.

(*t*) *Cholmley* v. *Paxton*, 3 Bing. 207; 5 Bing. 48.

(*u*) See 22 & 23 Vict. c. 35, s. 13.

(*v*) *Buckley* v. *Howell*, 29 Beav. 546. (*w*) 44 & 45 Vict. c. 41.

(*x*) *Downes* v. *Grazebrook*, 3 Mer. 208; 17 R. R. 62. See *Ex parte Dunman*, 2 Rose, 66; *Ex parte Harly*, 2 Durn. & E. 631; *Davey* v. *Durrant*, 1 De G. & J. 535.

(*y*) *Fry* v. *Tapson*, 28 Ch. D. 268.

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even as against their *cestui que trustent*, and it has been held, independently of statutory enactments, that conditions even of a special character are not lightly to be deemed to be of such a depreciatory character as to render personal representatives selling under such conditions liable to the persons entitled for breach of trust, or to constitute an objection to title (*z*). And as regards such conditions amounting to a breach of trust as between a trustee and his *cestui que trustent*, or an objection to title so as to entitle a *cestui que trust* or purchaser to set aside the sale, s. 14 of the Trustee Act, 1893, enacts as follows:

Power to sell subject to depreciatory conditions.

"(1) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

"(2) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

"(3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid."

Surplus proceeds of sale.

It may be that upon a sale of real estate under the Land Transfer Act, 1897, the proceeds of sale, after satisfying the liabilities of the deceased owner, will leave a surplus in the hands of the personal representatives, which will become payable to the devisee or heir in whom the real estate, if unsold, would have vested (*a*). If the devisee or heir die before the sale is effected, the surplus proceeds will apparently devolve as real estate, but if he die after the sale, so that a

(*z*) Sugd. V. & P. (14th ed.), 63. See *Hudson* v. *Bell*, 2 Beav. 17; *Hyde* v. *Dallaway*, 4 Beav. 696; *Morley* v. *Cook*, 2 Hare, 106.

(*a*) 2 & 3 Vict. c. 60, s. 2.

conversion was effected in his lifetime, the persons beneficially entitled must be either his residuary legatee or next-of-kin (*b*).

Personal representatives mortgaging may give power of sale.

It is now settled that personal representatives or trustees, having power to mortgage, are authorised to give to the mortgagee a power of sale (*c*); a power of sale is now implied in every mortgage made by deed, unless expressly excluded (*d*).

Rate of interest.

The personal representatives having power to mortgage the real estate of their testator or intestate, will have power to charge the property with interest on the money advanced until repayment, at any rate which may be agreed upon, not necessarily restricted to the rate of interest usually allowed by the Court (*e*).

Power of dealing with assets, how determined.

The power of the personal representative to deal with the assets for the purposes of administration will continue so long as there remain assets to administer, unless in the meantime an injunction is granted to restrain him from dealing with them, or a receiver is appointed. A mere administration decree, no receiver having been appointed, nor any injunction granted, will not take away the representative's legal powers of dealing with the assets so as to invalidate the title of persons claiming under a disposition made by him in exercise of those powers (*f*).

(*b*) *Cf. Hyett* v. *Mekin*, 25 Ch. D. 735.

(*c*) *Lewis* v. *Freke*, 2 Ves. jun. 507. See *Lord Kilmurry* v. *Geery*, 2 Salk. 538; *Boycott* v. *Cotton*, 1 Atk. 552; *Hall* v. *Carter*, 2 Atk. 358.

(*d*) 44 & 45 Vict. c. 41, s. 19.

(*e*) *Russell* v. *Plaice*, 18 Beav. 21; *Re Chawners' Will*, L. R. 8 Eq. 569; *Cruikshank* v. *Duffin*, L. R. 13 Eq. 555.

(*f*) *Berry* v. *Gibbons*, L. R. 8 Ch. App. 747; *Re Hoban, Lonergan* v. *Hoban*, [1896] 1 I. R. 401.

CHAPTER IX.

OF PAYMENT OF DEBTS BY THE PERSONAL REPRESENTATIVE.

SECTION I.

Of Rules of the Common Law as to Payment of Debts.—Preference and Retainer.

Funeral expenses.

The burial of the dead is the first duty of the personal representative. The expenses properly incurred in the discharge of this duty will occasion the first demand upon, and justify the first expenditure by him out of the assets (*a*).

Payment of debts.

The next occasion of disbursement will be the payment of testamentary expenses, including estate duty (if any), necessarily incurred for the purpose of establishing the title of the personal representative to administer the estate (*b*); and, next, after these preliminary expenses, the payment of debts owing by the deceased (*c*), for, as between creditors and beneficiaries, the primary duty of the personal representative has always been to administer the assets in payment of debts (*d*); and the same primary duty is, by s. 2 of the Land Transfer Act, 1897 (*e*), now imposed upon the personal representative in respect of real estate.

(*a*) Wentw. Off. Ex. (14th ed.), pp. 258, 260; 2 Bla. Com. (10th ed.), 511.

(*b*) As to these expenses, see *Re Clemow, Yeo* v. *Clemow*, [1900] 2 Ch. 182, 195; *Re Sharman, Wright* v. *Sharman*, [1901] 2 Ch. 280. And see *post*, pp. 372, 381, 382.

(*c*) Wentw. Off. Ex. (14th ed.), p. 260; Toller (7th ed.), 257.

(*d*) See *per* Jessel, M.R., in *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236, at p. 243.

(*e*) 60 & 61 Vict. c. 65.

Legal and equitable assets.

Where the estate is amply sufficient for the payment of debts, it is not very material in what order the debts are satisfied; but where the estate is known to be insolvent, or may possibly prove to be insolvent, and consists, as since the passing of the Land Transfer Act, 1897, it frequently will consist, of both legal and equitable assets, it is important that the personal representative should have regard to the rules of the common law and equity and statutory provisions applicable to the administration of legal and equitable assets respectively.

Necessity of adhering to rules of law in the disposal of legal assets.

The personal representative being liable in respect of legal assets to a common law action of debt at the instance of any creditor, it is incumbent upon him, in the disposal of such assets, at the risk of being unable to plead as a defence to any such action disbursements made previously and by way of preference to the debt sought to be recovered therein, to have strict regard to the legal rights of creditors to priority of payment *inter se*. For whatever may be the ultimate rights, at the present day, of creditors *inter se*, in the event of the estate being subsequently administered by the Court as an insolvent estate under s. 10 of the Judicature Act, 1875 (and these rights are not the common law rights which formerly were recognised by Courts of Equity in the administration of insolvent estates (*f*)), the truth of the personal representative's plea of *plene administravit* or *plene administravit præter* to an action at common law brought by an individual creditor before the protection of an order for administration has been obtained, will be tried by reference to common law rights and obligations. If by reason of payments made to

Judicature Act, 1875, s. 10.

(*f*) The method of distribution adopted by the Court in the administration of insolvent estates under s. 10 of the Judicature Act, 1875, is, in the main, that of the Court of Bankruptcy, namely, *pari passu* payment among all creditors entitled to prove. The section will be found fully discussed *post*, pp. 278 *et seq.*

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other creditors in undue preference the personal representative fail to substantiate his plea, an immediate judgment for payment of the debt *de bonis testatores* will be recovered against him, which will amount to an admission on his part of assets in his hands sufficient for the payment thereof.

The following are the rules of law which determine the priorities of creditors *inter se* in respect of legal assets:

General rule of administration as to legal assets.

The first or general rule of law is that creditors must be paid in priority out of legal assets according to the degree of the several debts for which they respectively claim payment. If, in disregard of this rule, the personal representative pays debts of a lower in preference to those of a higher degree, he may be bound, upon a deficiency of assets, to answer those of a higher degree out of his own estate (*g*). But a personal representative who, without notice of the existence of a debt of higher degree, pays debts of a lower degree in due course of administration, will not be held liable to account at the instance of that creditor (*h*).

Rule as to priority of Crown and judgment creditor of personal representative.

The second rule of law is that as between creditors holding debts of equal degree, the Crown, by prerogative (*i*), is first entitled, and any creditor who has recovered judgment against the personal representative is next entitled to payment out of legal assets.

Preference.

Save for the last-mentioned rule, there is no rule entitling any one creditor of a particular class (the class being determined, in accordance with the first-mentioned rule, by reference to the degree of debt which the creditor holds) to payment out of legal

(*g*) 2 Bla. Com. (10th ed.), p. 511.

(*h*) *Harman* v. *Harman*, 2 Show. 492 (case 449); *Re Fludyer, Wingfield* v. *Erskine*, [1898] 2 Ch. 562.

(*i*) 3 Bac. Abr. (7th ed.), 514 n; Wentw. Off. Ex. (14th ed.), p. 297 n; *Re Henley & Co.*, 9 Ch. D. 469 [C. A.].

assets in priority to any other creditor of the same class, nor is there any rule entitling creditors of the same class to payment *pro rata* out of legal assets. On the contrary, the rule is established that the personal representative is entitled, out of legal assets, to prefer any one creditor to any other of the same class, provided that other be neither the Crown nor a judgment creditor. In the absence, indeed, of some such administrative right, it is clear that the personal representative would, in many cases, be effectually prevented, by reason of his common law liability for debt, from proceeding with the administration of the estate without the assistance of the Court.

Retainer.

In addition to the right of preference, or, more correctly perhaps, in pursuance of that right, the personal representative is entitled to retain, out of legal assets, any debt owing to himself as against all other creditors of the same class as himself except the Crown and any judgment creditor who has recovered judgment against him for immediate payment in the ordinary form.

It is now proposed to consider the above rules of administration and the administrative rights of preference and retainer in the order mentioned.

Degrees of debts.

First, then, with reference to the first or general rule of administration, it is to be observed that there are now four degrees of debts ranking in order of superiority as follows:

1. Debts due to the Crown by matter of record or by specialty;
2. Debts by judgment or recovery in some Court of record;
3. Debts of recognizance;
4. Debts by specialty and simple contract debts.

Debts of the first degree.

Debts, therefore, which are secured to the Crown by specialty or by matter of record have precedence over

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all other debts, of whatever nature, as well of a prior as of a subsequent date (*k*).

Debts secured to the Crown by specialty are of the same degree as those of record; for, by the statute 33 Hen. 8, c. 39, it is enacted that all obligations and specialties taken to the use of the King, shall be of the same nature as a statute staple (*l*).

It is therefore a good defence to an action against the personal representative by any creditor, that the deceased died indebted to the Crown by matter of record or by specialty and did not leave assets more than sufficient to satisfy such debt (*m*).

Effect of assignment of debts.

Since it is the degree of the debt which determines the priority to which at common law the holder is entitled, it follows that a debt by specialty originally secured to the Crown but of which a subject has become the holder, is nevertheless entitled to preference in the hands of the subject (*n*). On the other hand, a debt by specialty due from the deceased to a private person and assigned by the latter to the Crown, does not entitle the Crown to claim priority of payment as in respect of a debt by specialty originally secured to the Crown (*o*).

Simple contract debts due to the Crown

Debts due to the Crown otherwise than by specialty or matter of record, are not so pivileged (*p*). Thus, sums of money due to the Crown on wood sales, sales of tin or of other minerals for which no specialty is given, must not be preferred to a debt due to a subject by matter of record. So also, though fines and amercements in the King's Courts of record are clearly

(*k*) Wentw. Off. Ex. (14th ed.), p. 261; 2 Swinb. (7th ed.), p. 825.

(*l*) Wentw. Off. Ex. (14th ed.), p. 262.

(*m*) Wentw. Off. Ex. (14th ed.), p. 261; Godolph. (3rd ed.), p. 216; 3 Bac. Abr. (7th ed.), 514; Com. Dig. (5th ed.), Admon. C. 2.

(*n*) *Re Churchill, Manisty* v. *Churchill*, 39 Ch. D. 174.

(*o*) Com. Dig. (5th ed.), Admon. C. 2; 11 Vin. Abr. 301.

(*p*) *Re Henley & Co.*, 9 Ch. D. 469, 474.

debts of record, and entitled to preference, yet amercements in the King's Courts baron are not of record, and, in common with fines for copyhold estates and money arising from the sale of estrays within the King's manors, are not entitled to any preference under the above rule (*q*).

Debts of the second degree.

Next in degree to specialties due to the Crown are judgment debts, sometimes called debts by record (*r*). These are debts due from the deceased by virtue of any judgment recovered or conferred against him in any judicial proceeding in any Court of record (*s*).

Registration.

Pursuant to s. 3 of the statute 23 & 24 Vict. c. 38, a judgment debt, in order to rank according to its legal order of precedence, must hitherto have been registered in the books kept for that purpose in the Central Office of the High Court; although for this purpose re-registration after the expiration of five years has been held unnecessary (*t*). The above section, however, is now repealed as from the 1st of July, 1901 (*u*), with the result, apparently, that the old law has been revived and that a creditor who recovered judgment against the deceased debtor in his lifetime is in any case entitled to claim payment of his debt out of legal assets next after the payment of specialties due to the Crown (*x*).

Unregistered judgments.

Judgment creditors of the deceased whose judgments were not registered in accordance with the provisions

(*q*) Wentw. Off. Ex. (14th ed.), p. 263; Godolph. (3rd. ed.), p. 216; 3 Bac. Abr. (7th ed.), 514; Com. Dig. (5th ed.). Admon. C. 2. See as to priority of Crown over other creditors of same class, *post*, p. 202.

(*r*) Wentw. Off. Ex. (14th ed.), p. 265; 2 Swinb. (7th ed.) 826; Godolph. (3rd ed.), p. 217.

(*s*) Godolph. (3rd ed.), p. 217; 11 Vin. Abr. 297; *Searle* v. *Lane*, 2 Vern. 88. See as to what Courts are Courts of record, 2 Swinb. (7th ed.) 827; 3 Bla. Com. (10th ed.), p. 32.

(*t*) *Simpson* v. *Morley*, 2 Kay & J. 71.

(*u*) 63 & 64 Vict. c. 26, ss. 5, 6.

(*x*) See and *cf. Fuller* v. *Redman*, 26 Beav. 600.

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(while remaining in force) of the statute above referred to, could only claim against legal assets in competition with simple contract creditors (*y*). So a judgment debt recovered in a foreign country is considered here as a simple contract debt (*z*).

A judgment debt duly registered has been held to retain priority in the hands of a surety who had been called upon to satisfy the debt, notwithstanding that he had obtained no actual assignment of the judgment (*a*).

Judgment debts rank equally *inter se* whatever be the priority of their dates (*b*), subject to the right of the personal representative to prefer any one debt to any other of equal degree (*c*).

Decree of Court of Equity.

For purposes of administration, a decree of a Court of Equity is equivalent to a judgment at law, and money due under the former stands in the same order of payment as money due under the latter (*d*).

But the decree to be equivalent to a judgment at law must amount to a definite order for payment of a sum certain (*e*); "for if it be not conclusive of the matters in question as if it be merely to account, and does not ascertain the sum to be paid, it is analogous only to a judgment *quod computit* at law; and that is no complete judgment till the account be stated.

(*y*) *Van Gheluive* v. *Nerincks*, 21 Ch. D. 189. See *Horne* v. *Shepherd*, 3 Jur. (N.S.) 806.

(*z*) *Dupleix* v. *De Roven*, 2 Vern. 540; *Re Boyse, Crofton* v. *Crofton*, 15 Ch. D. 591.

(*a*) *Re M'Myn, Lightbown* v. *M'Myn*, 33 Ch. D. 575.

(*b*) Wentw. Off. Ex. (14th ed.), p. 269; Godolph. (3rd ed.), p. 217. As to the right of judgment creditors who are in the position of secured creditors, see *post*, pp. 284 *et seq.*

(*c*) *Post*, p. 206.

(*d*) 11 Vin. Abr. 301; 3 Bac. Abr. (7th ed.) 516; *Bligh* v. *Darnley*, 2 P. Wms. 619, 621; *Robinson* v. *Tonge*, 3 P. Wms. 398, 401, n; *Smith* v. *Haskins*, 2 Atk. 385.

(*e*) See *Chadwick* v. *Holt*, 8 De G. M. & G. 584; *Mansfield* v. *Ogle*, 4 De G. & J. 38; *Ward* v. *Shakeshaft*, 1 Drew. & Sm. 269; *Wilson* v. *Lady Dunsany*, 18 Beav. 299.

Therefore it has been held that, pending a bill in equity, and after such decree, an executor may pay any other debt of a higher, or an equal nature, in case the assets be legal, although he has no power of so doing as against a final decree" (*f*).

Debts of the third degree.

Next in degree to judgment debts come debts due from the deceased upon recognizance (*g*).

A recognizance is an obligation of record, which a man enters into before some Court of record or magistrate duly authorised, with condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like (*h*). It is in most respects like any other bond, the difference being chiefly this: that a bond is the creation of a fresh debt or obligation *de novo*, a recognizance is an acknowledgment of a former debt upon record (*i*).

A recognizance being certified to, or taken by the officer of some Court, is witnessed only by the record of that Court, and not by the party's seal; so that it is not in strictness a deed, though the effects of it are greater than a common obligation (*i*).

Debts upon recognizance are commonly met with in the case of receivers appointed by the Court (*l*). In such case every sum of money due from the receiver, whether an ascertained balance or not, is a debt of record so long as the recognizance exists (*m*).

Statutes, merchant and staple.

Statutes merchant and staple and recognizances in the nature of statutes staple have now fallen into

(*f*) See 2 Swinb. (7th ed.), p. 830 n; *Smith* v. *Haskins*, 2 Atk. 385; *Mason* v. *Williams*, 2 Salk. 507. See *Harding* v. *Edge*, 1 Vern. 143.

(*g*) Wentw. Off. Ex. (14th ed.), p. 272; 2 Bla. Com. (10th ed.), p. 511; 2 Swinb. (7th ed.), p. 827.

(*h*) 2 Bla. Com. (10th ed.), p. 341.

(*i*) *Ibid.*

(*l*) See *Anglcheart* v. *Ordell*, cited in 7 Ch. D., at p. 546.

(*m*) *Seagram* v. *Tuck*, 18 Ch. D. 296.

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disuse (*n*), but formerly ranked equally with recognizances (*o*).

Debts of the fourth degree.

Specialty and simple contract debts must now be considered together as of one degree ranking next to recognizances (*p*). Prior to the year 1870 specialty debts were regarded as of a superior degree to simple contract debts; and creditors by specialty were accordingly entitled to be paid in full out of legal assets before any dividend was available for simple contract creditors (*q*).

Hinde Palmer's Act.

By Hinde Palmer's Act (*r*), after reciting that it is expedient to abolish the distinction as to priority of payment between specialty and simple contract debts of deceased persons, it was enacted that—

> "In the administration of the estate of every person who shall die on or after the first day of January one thousand eight hundred and seventy no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: Provided always, that this Act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt."

Construction of the Act.

The true construction of this Act has been the subject of considerable difference of opinion among the judges of the High Court. In *Re Williams'*

(*n*) See, as to the nature of these securities, 2 Bla. Com. (10th ed.), p. 160.

(*o*) Went. Off. Ex. (14th ed.), p. 272; 2 Swinb. (7th ed.), p. 827; Godolph. (3rd ed.), p. 218.

(*p*) Wentw. Off. Ex. (14th ed.), p. 276.

(*q*) 11 Vin. Abr. 304; 3 Bac. Abr. (7th ed.) 516.

(*r*) 32 & 33 Vict. c. 46.

Estate (*s*), the Act was construed, in reference to the rule entitling a creditor who has recovered judgment for his debt to priority over other creditors of the same class, as having abolished all the distinctions between specialty and simple contract debts; but in other cases (*t*), in reference to the rule entitling the Crown to priority over other creditors of the same class, and in reference to the personal representative's adminstrative rights of preference and retainer, the construction for the most part adopted was such that specialty debts were to remain, as under the former law, of superior degree to simple contract debts. All doubt as to the true construction of the Act is now fortunately set at rest by the recent decision of the Court of Appeal in *Re Samson, Robbins* v. *Alexander* (*u*), where the question arose with reference to the right of the personal representative to prefer the debts of simple contract creditors to those of specialty creditors. In that case the Court, adopting the view expressed in *Re Williams' Estate* (*x*), and *In re Orsmond, Drury* v. *Orsmond* (*y*), held that the Act was intended to produce equality of distribution by means of the abolition of the distinction between specialty creditors and simple contract creditors, and the opinion was expressed by FLETCHER MOULTON, L.J., that so far as the cases there cited (*z*), suggest that under the present law two funds ought to be formed, one in respect of the specialty debts, and the other in respect of the simple contract

(*s*) L. R. 15 Eq. 279.

(*t*) See *Wilson* v. *Coxwell*, 23 Ch. D. 764; *Re Jones, Culver* v. *Laxton*, 31 Ch. D. 440; *Re Briggs, Earp* v. *Briggs*, W. N. (1894), 162; *Re Bentinck, Bentinck* v. *Bentinck*, [1897] 1 Ch. 673; *Re Hankey, Cunliffe Smith* v. *Hankey*, [1899] 1 Ch. 541; and *cf. Re Hastings, Shirreff* v. *Hastings*, 16 Ch. D. 610; *Crowder* v. *Stewart*, 16 Ch. D. 368; *Re Orsmond, Drury* v. *Orsmond*, 58 L. T. (N.S.) 24.

(*u*) [1906] 2 Ch. 584.

(*x*) L. R. 15 Eq. 270.

(*y*) 58 L. T. (N.S.) 24.

(*z*) The cases, that is to say, of *Wilson* v. *Coxwell*, *Re Jones*, *Re Briggs*, *Re Bentinck* and *Re Hankey*, cited in note (*t*), *supra*.

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debts, those decisions are erroneous, and are in direct conflict with the provisions of Hinde Palmer's Act.

Priority of Crown and judgment creditor as against creditors of the same class.

The second rule of administration above stated (*a*), by virtue of which the Crown is first entitled, and any creditor who has recovered judgment against the personal representative for his debt, is next entitled to payment as between creditors of the same class, is founded as to the priority of the Crown, upon the Crown's prerogative (*b*), and as to the priority of the judgment creditor, upon the maxim "*vigilantibus non dormientibus leges subveniunt*" (*c*).

Application of rule.

The rule applies only to payment out of legal assets (*d*); and as between creditors of the same class (*e*).

As already explained, it is now settled that specialty and simple contract creditors are of one and the same class (*f*). The method of distribution, therefore, adopted in *Re Bentinck, Bentinck* v. *Bentinck* (*g*), as between the Crown claiming in respect of a simple contract debt and other specialty and simple contract creditors, can no longer be regarded as correct, but the Crown, though claiming only in respect of a simple contract debt is entitled just as a creditor who has recovered judgment for such a debt is entitled (*h*), to payment out of legal assets in priority to both specialty and simple contract creditors.

Judgment for immediate payment.

In order to confer priority, a judgment recovered against a personal representative must be a judgment

(*a*) *Ante*, p. 194.

(*b*) 3 Bac. Abr. (7th ed.) 514 n; Wentw. Off. Ex. (14th ed.), p. 297 n; *Re Henley & Co.*, 9 Ch. D. 469 [C. A.].

(*c*) *Ashley* v. *Pocock*, 3 Atk. 208; *Re Williams' Estate*, L. R. 15 Eq. 270.

(*d*) *Ashley* v. *Pocock, supra; Dollond* v. *Johnson*, 2 Sm. & G. 301; *Jennings* v. *Rigby*, 33 Beav. 198.

(*e*) *Waring* v. *Danvers*, 1 P. Wms. 296; *Re Bentinck, Bentinck* v. *Bentinck*, [1897] 1 Ch. 673.

(*f*) *Ante*, p. 201.

(*g*) [1897] 1 Ch. 673.

(*h*) *Re Williams' Estate, supra.*

entitling the creditor to immediate payment of the debt out of legal assets, and must have been recovered before any decree for administration (which would enure for the benefit of all creditors) has been made (*i*).

Thus where certain creditors had brought an action in the Exchequer Division and obtained, not a judgment, but only an order enabling them to sign judgment, if the amount of their debt was not paid within five days, and in the meanwhile another creditor obtained judgment in an administration action on behalf of all the creditors, it was held that the creditors in the first mentioned action had obtained no priority over the other creditors (*k*).

Separate judgments

The judgments of several creditors, separately recovered, rank in order of priority according to their respective dates (*l*).

No registration necessary.

Judgments recovered against the personal representative do not require registration to ensure priority to the judgment creditor (*m*). The object of the statutory provision (*n*) requiring registration of judgments recovered against the deceased debtor, was to prevent the risk that the personal representative might commit a devastavit by preferring debts of inferior degree, which he is not justified in doing if he has even constructive notice of the existence of debts of a higher degree. It is obvious that no such protection is necessary in the case of debts for which judgment has been recovered against the personal representative himself.

(*i*) *Parker* v. *Ringham*, 33 Beav. 535; *Largan* v. *Bowen*, 1 Sch. & Lef. 299; *Paxton* v. *Douglas*, 8 Ves. 521. See *Re Illidge*, *Davidson* v. *Illidge*, 27 Ch. D. 478 [C. A.].

(*k*) *Re Stubbs' Estate*, *Hanson* v. *Stubbs*, 8 Ch. D. 154. See *Re Gurney*, *Clifford* v. *Gurney*, [1896] 2 Ch. 863.

(*l*) *Dollond* v. *Johnson*, 2 Sm. & G. 301; *Re Williams' Estate*, L. R. 15 Eq. 270.

(*m*) *Jennings* v. *Rigby*, 33 Beav. 198; *Re Williams' Estate*, *supra*.

(*n*) Now repealed. *Ante*, p. 197.

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The right of preference.

Having disposed of the rights of outside creditors to priority of payment, we will now pass on to a consideration of the administrative and personal rights or privileges of preference and retainer exercisable by the personal representative for his own protection and to his own advantage in respect of legal assets.

Definition.

The right of preference may be defined as a right on the part of the personal representative, in the course of administration of legal assets, to pay debts which stand in the same degree in such order as he pleases (*o*) until judgment for administration is obtained or a receiver is appointed.

Necessity of right.

In the recent case of *Re Samson, Robbins* v. *Alexander* (*p*), before the Court of Appeal, it was contended on the part of specialty creditors that the right of preference is altogether inconsistent with the provisions of Hinde Palmer's Act (*q*), and that no such right is now exercisable. This contention, however, the Court refused to sustain, holding that the Act would not bear the construction contended for, and at the same time pointing out the inconvenience which would necessarily result if any such view of the Act were adopted. "The result would be," says BUCKLEY, L.J., "that in a vast number of cases an executor could never safely pay any creditor in full. For it might turn out that the estate would not produce enough. The result would be that the executor would have to go to the creditor and say 'unless you get a judgment against me, in which case I can safely pay you in full, I cannot pay you. You must wait.' If he tendered him a dividend, the creditor might reply, 'I will not take a dividend; I will have 20*s.* in the pound, or I will take nothing.' The result would be that in every

(*o*) See the rule stated and discussed in *Lyttleton* v. *Cross*, 3 B. & C. 317, and in *Re Samson, Robbins* v. *Alexander*, [1906] 2 Ch. 584.

(*p*) [1906] 2 Ch. 584.

(*q*) 32 & 33 Vict. c. 46.

case the executor would be in peril, and would have to institute, or incite some creditor to institute, an action for administration."

Specialty and simple contract creditors.

In the same case it was held that the personal representative is entitled in the exercise of his legal right of preference to pay simple contract creditors in full, leaving specialty creditors unpaid (*r*).

Saving of rights of Crown and judgment creditor.

The right of the personal representative to prefer is subject to the rule giving priority at law to the Crown and any creditor who has recovered judgment for his debt against the personal representative, over other creditors of equal degree (*s*).

Decree for administration

A general decree for administration, since it enures for the benefit of all creditors, will absolutely determine the right of the personal representative to make any preference in the subsequent administration of the assets (*t*); but an order for an account under Rules of the Supreme Court, O. 15, r. 1, will not have that effect (*u*).

Or appointment of receiver determines right of preference.

Notice of the commencement of an action at law was formerly sufficient to prevent the exercise by the personal representative of his right to prefer to the prejudice of such action (*x*); but since the passing of the Judicature Act, 1873 (*y*), the equitable rule that the right to prefer remains until judgment or decree (*z*) or the appointment of a receiver will prevail in all cases (*a*).

(*r*) Following, therefore, *Re Orsmond, Drury* v *Orsmond*, 58 L. T. (N.S.) 24, and overruling *Re Hankey, Cunliffe Smith* v. *Hankey*, [1899] 1 Ch. 541. See *ante*, p. 201.

(*s*) Wentw. Off. Ex. (14th ed.), p. 282.

(*t*) *Jones* v. *Jukes*, 2 Ves. 518; *Re Barrett, Whitaker* v. *Barrett*, 43 Ch. D. 70; *Davies* v. *Parry*, [1899] 1 Ch. 602; *Re Richards, Lawson* v. *Harvey*, [1901] 2 Ch. 399.

(*u*) *Re Barrett, Whitaker* v. *Barrett, supra.*

(*x*) *Parker* v. *Dee*, 2 Ca. Ch. 200; 3 Swanst. 529 n.

(*y*) Section 25 (11). (*z*) *Darston* v. *Lord Orford*, Pr. Ch. 188.

(*a*) *Re Radcliffe*, 7 Ch. D. 733; *Vibart* v. *Coles*, 24 Q. B D. 364 [C. A.].

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A receiver will not, however, be appointed for the mere purpose of determining the personal representative's right to prefer. To justify such an appointment it will be necessary to show that the assets are being wasted (*b*).

A mere demand by a creditor will not, of course, divest the executor of his right of preference; that effect can only be produced by the process of the Court (*c*).

Preference as between judgment creditors of deceased.

As between judgment creditors of the deceased, the personal representative's right of preference will apparently now be determined by summons for leave to issue execution under Rules of the Supreme Court, O. 42, r. 23, in place of a *scire facias* brought under the old practice (*d*).

Preference by creditor administrator.

In consequence of the recent order (*e*) made by the President of the Probate Division in regard to the form of bond to be given by an administrator to whom administration is granted as creditor, such an administrator is now debarred from exercising both the right of preference and the right of retainer.

Right of retainer.

The right of retainer is a personal right or privilege (*f*) on the part of the personal representative to retain, out of legal assets, any debt owing to himself as against creditors whose debts stand in the same degree as his own. It is the logical consequence of the right of preference. The personal representative having a right to prefer one creditor to another as amongst creditors of equal degree, it followed that if he were a creditor, he had a right to prefer himself to another

(*b*) *Philips* v. *Jones*, 28 Sol. J. 360, C. A.; *Re Harris*, *Harris* v. *Harris*, 35 W. R. 710; *Re Wells*, *Molony* v. *Brooke*, 45 Ch. D. 569; *Re Stevens*, *Cooke* v. *Stevens*, [1898] 1 Ch. 162, at p. 173.

(*c*) Wentw. Off. Ex. (14th ed.), p. 281.

(*d*) Wentw. Off. Ex. (14th ed.), p. 269.

(*e*) Practice Note, W. N. (1899) p. 262. See *post*, p. 214.

(*f*) See *Re Bennett*, *Ward* v. *Bennett*, [1906] 1 Ch. 216, 227.

creditor of equal degree; and this was called "retainer" because he had the money in his own hands; but it was, in reality, the exercise of the right of preference in his own favour, and the proof that that was so was that he had no right of retainer against a creditor of a higher degree (*g*).

Origin of rule.

The right of retainer may also be said to be the logical consequence of the rule, enabling a creditor, by recovering judgment against the personal representative, to obtain priority over all other creditors of equal rank (*h*); and is explained by COTTON, L.J. in *Re Compton, Norton* v. *Compton* (*i*), as follows:

"An executor having a claim against the testator's estate is not to be put in a worse position than any other creditor, who by suing and obtaining a judgment against the executor, could obtain priority, while the executor not being able to sue himself, could not obtain priority."

Limit of rule.

The right is therefore exercisable by the personal representative as against other creditors of equal rank with himself (*k*), in any case in which, had he not been personal representative, he might have recovered judgment and obtained priority (*l*). This proposition, it is thought, is universally true at the present day; for although, at one time, an inconsistency in this respect was introduced into the law by the decision in *Wilson* v. *Coxwell* (*m*) and other cases (*n*), that a personal repre-

Retainer in respect of simple contract debt against specialty creditor.

(*g*) See *per* JESSEL, M.R., in *Talbot* v. *Frere*, 9 Ch. D. 568, 570.

(*h*) 3 Bla. Com. (10th ed.), p. 19. See *per* LINDLEY, L.J., in *Re Baker, Nichols* v. *Baker*, 44 Ch. D. 262, 272 [C. A.].

(*i*) 30 Ch. D. 15, 19, 23 [C. A.]. See *Chapman* v. *Turner*, 11 Vin. Abr. 72.

(*k*) 3 Bla. Com. (10th ed.), p. 19. See *per* COTTON, L.J., in *Re Hubback, International Marine Hydropathic Co.* v. *Hawes*, 29 Ch. D. 934, 941 [C. A.]. See *Talbot* v. *Frere*, 9 Ch. D. 568; *Re Allen, Adcock* v. *Evans*, [1896] 2 Ch. 345.

(*l*) *Plumer* v. *Marchant*, 3 Burr. 1380, 1384. See *Jones* v. *Evans*, 2 Ch. D. 420.

(*m*) 23 Ch. D. 764.

(*n*) *Re Jones, Calver* v. *Laxton*, 31 Ch. D. 440; *Re Briggs, Earp* v. *Briggs*, W. N. (1894) 162.

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sentative could not retain in respect of a simple contract debt owing to himself as against creditors by specialty, there appears to be little doubt now that these decisions are erroneous, and that in accordance with the principle of the decision of the Court of Appeal in *Re Samson, Robbins* v. *Alexander* (*o*), it is competent for a personal representative to retain in respect of a simple contract debt as against creditors by specialty, no less than as against other simple contract creditors (*p*).

Retainer subject to priorities of Crown and judgment creditor.

The right of retainer is exercisable subject to the right of the Crown to payment in priority to other creditors (including the personal representative) of the same class (*q*), and subject also to the right of any creditor who, having recovered judgment against the personal representative for immediate payment of his debt, has become entitled to a similar priority (*r*). In the latter case the judgment obtained in the action amounts to a conclusive admission of assets on the part of the personal representative who might have set up his right of retainer as a defence to the action, but not having done so has allowed judgment to be recovered in the ordinary form (*s*).

To what debts the right of retainer extends.

The personal representative is entitled, by virtue of his right of retainer, to withdraw from legal assets in his hands (distributable amongst himself and other creditors of equal degree) enough to pay his own debt, provided that the amount of the debt is ascertained or capable of being ascertained, by means of an account, from outstanding items of indebtedness (*t*).

"Damages, that are in their nature arbitrary, cannot be retained, because, till judgment, no man can fore-

(*o*) [1906] 2 Ch. 584.
(*p*) See *Crowder* v. *Stewart*, 16 Ch. D. 368.
(*q*) 3 Bac. Abr. (7th ed.) 514 n.
(*r*) *Re Marvin, Crawter* v. *Marvin*, [1905] 2 Ch. 490.
(*s*) *Ramsden* v. *Jackson*, 1 Atk. 292; *Re Marvin, supra*.
(*t*) *Re Morris' Estate, Morris* v. *Morris*, L. R. 10 Ch. A. 68.

tell their amount. Such are damages founded upon torts. But where damages arise from the breach of a pecuniary contract (*u*), there is a certain measure for them; and such damages may well be retained. The remedy for a note of hand carrying interest is only in damages, but will any one say this shall not be retained?" (*x*).

Accordingly, the personal representative may retain the amount of all arrears of an annuity falling due to him from the deceased's estate, during the administration, but not the "estimated value" of a future annuity (*y*). So, also, a surviving partner who is appointed executor by his deceased partner has a right of retainer in respect of a balance to be ascertained in chambers upon taking the partnership accounts (*z*).

No retainer out of equitable assets.

The right of retainer, being a common law right, is exercisable only in respect of legal assets (*a*), and in no way affects the equitable right of creditors to equal payment out of equitable assets (*b*).

An executor had therefore no right of retainer as against real estate devised to him in trust for sale (*c*), nor as against real estate made assets in equity (*d*) by Lord Romilly's Act (*e*).

It has frequently been suggested that the effect of the Land Transfer Act, 1897 (*f*), has been to convert such real estate as would formerly have been equitable assets, into legal assets, according to which view the executor's right of retainer would extend so as to

(*u*) See *Re Compton, Norton* v. *Compton*, 30 Ch. D. 15 [C. A.].
(*x*) *Per* BLACKSTONE, J., in *Loane* v. *Casey*, 2 W. Black. 965.
(*y*) *Re Beeman, Fowler* v. *James*, [1896] 1 Ch. 48.
(*z*) *Re Morris' Estate, Morris* v. *Morris, supra.*
(*a*) *Re Baker, Nichols* v. *Baker*, 44 Ch. D. 262 [C. A.].
(*b*) *Hopton* v. *Dryden*, Pr. Ch. 179.
(*c*) *Bain* v. *Sadler*, L. R. 12 Eq. 570.
(*d*) *Walters* v. *Walters*, 18 Ch. D. 182.
(*e*) 3 & 4 Will. 4, c. 104.
(*f*) 60 & 61 Vict. c. 65.

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enable him to retain out of real estate devolving upon him under that Act. The contrary, however, has been held to be the case (*g*).

Former right of retainer of heir and devisee.

Both the heir (*h*) and the devisee (*i*) had formerly a right of retainer out of real estate descended or devised and constituting legal assets by descent; but as regards real estate devolving upon the personal representative under the Land Transfer Act, 1897, no such right can be exercisable so long as the common law remedy of the creditor remains suspended (*k*).

To what assets the right of retainer extends.

The right of the personal representative to retain extends to all legal assets which he has in his hands or which have been paid into Court while he was executor, and which, but for that payment, would have come into his hands (*l*), for the Court treats that payment into Court as, in effect, a payment into his hands (*m*). But the right does not extend to assets which he has not got in and which are not in his possession (*n*) actually or constructively (*o*); and cannot, therefore, be asserted in respect of assets got in by a receiver appointed by the Court (*p*).

In this connection, however, it is to be observed that the Court will not appoint a receiver at the instance of a creditor in an action for administration, merely in order to deprive the personal representative of his common law right of retainer, and so to benefit the

(*g*) *Re Williams, Holder* v. *Williams*, [1904] 1 Ch. 52. See *ante*, p. 148.

(*h*) *Re Illidge, Davidson* v. *Illidge*, 27 Ch. D. 478 [C. A.].

(*i*) *Loomes* v. *Stotherd*, 1 Sim. & St. 458.

(*k*) See *ante*, pp. 123, 124.

(*l*) *Re Compton, Norton* v. *Compton*, 30 Ch. D. 15, 19 [C. A.].

(*m*) *Richmond* v. *White*, 12 Ch. D. 361, C. A.; *Re Langley, Johnson* v. *Langley*, W. N. (1899), 23.

(*n*) *Re Rhoades*, [1899] 2 Q. B. 347 [C. A.].

(*o*) *Pulman* v. *Meadows*, [1901] 1 Ch. 233.

(*p*) *Re Harrison, Latimer* v. *Harrison*, 32 Ch. D. 395. See *Trevor* v. *Hutchins*, [1896] 1 Ch. 844, 849 [C. A.].

general body of creditors. In order to justify such an appointment being made, it must be shown that the assets are being wasted (*q*).

If an executor-creditor dies without having got in assets during his life, his personal representatives, not being representatives of the original testator, are not entitled to retain assets of the first testator, subsequently recovered, but which never came into the hands or under the control of the original executor (*r*).

How right of retainer may be lost.

The right to retain remains in the personal representative until challenged, notwithstanding that he has done nothing to assert the right, unless he has released it or done something to deprive himself of it (*s*).

Neither an ordinary decree for administration (*t*) nor an order made under the Bankruptcy Act, 1883 (*u*), for the administration in bankruptcy of the estate of an insolvent testator, will operate to deprive the personal representative of his right of retainer. Nor will the personal representative lose his right by paying the assets in his hands into Court (*x*), or to a receiver appointed by the Court (*y*), or by paying them by mistake, to the official receiver under an administration order (*z*).

Retainer of debt owing to executor or

An executor or administrator is entitled to retain out of the legal assets not only a debt owing to him

(*q*) *Re Wells, Molony* v. *Brooke*, 45 Ch. D. 569; *Re Stevens, Cooke* v. *Stevens*, [1898] 1 Ch. 162, 173 [C. A.].

(*r*) *Re Compton, Norton* v. *Compton, supra.*

(*s*) *Re Rhoades, supra.* See *Re Birt, Birt* v. *Burt*, 22 Ch. D. 604; *Wilson* v. *Coxwell*, 23 Ch. D. 764; *Re Giles, Jones* v. *Pennefather*, [1896] 1 Ch. 956; *Re Marvin, Crawter* v. *Marvin*, [1905] 2 Ch. 490.

(*t*) *Nunn* v. *Barlow*, 1 S. & S. 588; *Lee* v. *Nuttall*, 12 Ch. D. 61, C. A.; *Re Orme, Evans* v. *Maxwell*, 50 L. T. 51; *Ex parte Campbell*, 16 Ch. D. 198; *Davies* v. *Parry*, [1899] 1 Ch. 602.

(*u*) *Re Rhoades, supra.*

(*x*) *Lee* v. *Nuttall, supra; Re Giles, Jones* v. *Pennefather*, [1896] 1 Ch. 956; *Re Langley, Johnson* v. *Langley*, 68 L. J. Ch. 361.

(*y*) *Re Harrison, Latimer* v. *Harrison*, 32 Ch. D. 395; *Re Giles, supra.*

(*z*) *Re Rhoades, supra.*

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administrator as trustee.

personally, but also a debt owing to him in the capacity of trustee for another person, and he is bound to exercise the right of retainer if so required by his *cestui que trust* (*a*). But the personal representative of a deceased sole trustee, being at liberty to refuse to act in the trust (*b*), is not bound, if he do so refuse, to exercise a right of retainer at the instance of the *cestui que trust* (*c*).

Retainer of debt owing to executor's trustee.

Conversely, if the deceased be indebted to a third person who is a trustee of the amount for a person who is named executor of the will, or to whom administration of the estate is granted, such executor or administrator, since he may prefer the debt of his own trustee, may also retain the amount due under the obligation to him (*d*).

No retainer in respect of partial interest in debt owing to executor's trustee.

But no right of retainer will be allowed unless the person to sue and the person to pay are the same (*e*). If, therefore, an executor or administrator is entitled only to a life interest in an amount due to trustees from the deceased's estate, and, consequently, is not entitled to receive the amount of the debt, he will not be allowed to retain either (1) in respect of the value of his life interest, a sum which never was a debt due from the deceased, or (2) the whole amount of the debt due to the trustees (*f*).

Retainer by limited administrators.

If an infant is appointed executor of a will and a grant of administration *durante minore ætate* is made

(*a*) *Plumer* v. *Marchant*, 3 Burr. 1380, cited 3 A. & E. 858; *Sander* v. *Heathfield*, L. R. 19 Eq. 21; *Re Faithfull*, 57 L. T. 14; *Davies* v. *Parry*, [1899] 1 Ch. 602, 605. See, as to equitable debts, *Re Morris' Estate*, L. R. 10 Ch. A. 68.

(*b*) *Ante*, p. 91.

(*c*) *Re Ridley*, *Ridley* v. *Ridley*, [1904] 2 Ch. 774; *Re Bennett*, *Ward* v. *Bennett*, [1906] 1 Ch. 216, overruling *Fox* v. *Garret*, 28 Beav. 16.

(*d*) *Cockroft* v. *Black*, 2 P. Wms. 297.

(*e*) *Re Dunning*, *Hatherley* v. *Dunning*, 54 L. J. Ch. 900 [C. A.].

(*f*) *Ibid.*; *Re Hayward*, *Tweedie* v. *Hayward*, [1901] 1 Ch. 221.

to another person, the administrator so appointed may assert his right of retainer as well for any debt owing to himself (*g*), as also for any debt owing to the infant in respect of which the infant, if of age, would have exercised the right as executor. And the same rule applies when administration is granted to a person on behalf of a lunatic executor (*h*). But where administration had been granted to the manager (not himself a creditor of the deceased) of a bank who were creditors, but, as a corporation aggregate, were themselves unable to take the oath necessary to obtain a grant, it was held that the manager could not, as administrator, retain the amount of the debt owing to the bank, the grant being personal to the manager and the case not being analogous to that of an administrator *durante minore ætate* or to the use of a lunatic (*i*).

Retainer by creditor administrator.

An administrator to whom a grant of administration has been made as creditor is precluded from exercising the right of retainer by the terms of the bond, which, pursuant to the provisions of the Probate Act, 1857 (*k*), he is bound to give upon taking out administration (*l*). Until the commencement of the year 1900, the ordinary bond of a creditor on taking out administration as such provided, *inter alia*, that the administrator should "well and truly administer according to law, pay all and singular the debts which he," the intestate, "did owe at his decease in a due course of administration rateably and proportionably and according to the priority required by law, and *not unduly preferring his own debt* or the debts of any other of the creditors of the deceased by reason of being an administrator as aforesaid."

(*g*) Com. Dig. (5th ed.) Admon. (F). See *Re Cope*, *Cope* v. *Cope*, 16 Ch. D. 49.

(*h*) *Franks* v. *Cooper*, 4 Ves. 763.

(*i*) *Re Richards*, *Lawson* v. *Harvey*, [1901] 2 Ch. 399.

(*k*) 20 & 21 Vict. c. 77, s. 86.

(*l*) Practice Note, W. N. (1899), p. 262.

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In *Davies* v. *Parry* (*m*) it was decided that the effect of these words was not to prevent the administrator from retaining his own debt inasmuch as the right to retain, being a legal right, the exercise of the right, though a preference, was not an undue preference. In consequence of this decision the form of the bond was altered as from January 1st, 1900, by order of the President of the Probate Division. The word "however" is substituted for the word "unduly," so that the bond now given by an administrator to whom administration is granted as creditor now reads "not however preferring."

Retainer by one of several executors or administrators.

One of several personal representatives may retain a debt due to himself, or to himself and other persons (*n*), but he cannot assert his right of retainer to the prejudice of the other representatives, "for administrators are considered but as one person in law, the possession of the one is the possession of the other, the receipt of the one is the receipt of the other, and therefore the retainer of the one must be considered as the retainer of the other and must enure for their mutual benefit in the discharge of the debts of both in proportion" (*o*).

Retainer of statute-barred debt.

A personal representative may retain in respect of a debt due to him which is barred by the Statute of Limitations (*p*), for the Statute destroys, not the debt, but the remedy only, or, in other words, does not affect the validity of the claim, but only bars the right to bring proceedings for its recovery; there is therefore nothing in the Statute to affect the right of retainer which, arising by operation of law, needs no overt act, or the

(*m*) [1899] 1 Ch. 602; approved in *Re Belham, Richards* v. *Yates*, [1901] 2 Ch. 52 [C. A.].

(*n*) *Crowder* v. *Stewart*, 16 Ch. D. 368; *Re Hubback, International Marine Hydropathic Co.* v. *Hawes*, 29 Ch. D. 934 [C. A.].

(*o*) *Chapman* v. *Turner*, 11 Vin. Abr. 72.

(*p*) *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415; *Hill* v. *Walker*, 4 Kay & J. 169. See *Midgley* v. *Midgley*, [1893] 3 Ch. 282, 297, C. A.; *Trevor* v. *Hutchins*, [1896] 1 Ch. 844, 848.

taking of any steps, for its assertion (*q*). But he will not be allowed to retain in respect of a debt founded on a contract which is void or not enforceable by reason of non-compliance with the formalities of the Statute of Frauds (*r*).

Retainer *in specie.*

Where the assets are of less value than the debt for which the personal representative claims to retain, it is not necessary for him to realise the assets in order that he may assert his right; the assets may in such case be retained *in specie* (*s*).

Executor *de son tort.*

An executor *de son tort* cannot retain (*t*).

SECTION II.

OF PREFERENCES PRESCRIBED BY CERTAIN STATUTES IN THE PAYMENT OF DEBTS.

It will have been observed that the rules of the common law, with which alone we have so far been concerned, relate exclusively to the payment of debts by the personal representative out of legal assets. There remain now to be considered the provisions of certain statutes, passed in favour of particular persons and societies, relating to the preferential payment of debts out of the estates of deceased persons without regard to the degree or quality of the debt, or the nature or character of the assets of which such estates are comprised. A few observations upon the duty of the personal representative in regard to the disposal of so much of the estate of the deceased as consists of equitable assets, will then conclude the subject of the present chapter.

(*q*) 3 Bla. Com. (10th ed.), p. 18. See *Re Rhoades*, [1899] 2 Q. B. 347.
(*r*) *Re Rownson, Field* v. *White*, 29 Ch. D. 358 [C. A.].
(*s*) *Re Gilbert*, [1898] 1 Q. B. 282.
(*t*) *Curtis* v. *Vernon*, 3 T. R. 587.

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The ground upon which preference has, in certain cases, been prescribed by statute for the payment of particular debts appears to be that, having regard to the circumstances under which the debts have been incurred, it is proper to treat the property of the debtor, so far as it is sufficient for their payment, as being the property of the creditor and as much removed from liability to answer the general debts due from the estate as property of which the deceased was in point of fact a trustee for other persons.

Debts due to parish by overseers of the poor.

By a statute passed in the reign of George II. (*u*), it is provided that if any overseer, such as therein mentioned, shall die, "his executors or administrators shall, within forty days after his decease, deliver over all things concerning his office to some churchwarden or other overseer of the same place, and shall pay out of the assets left by such overseer, all sums of money remaining due, which he received by virtue of his said office, before any of his other debts are paid and satisfied."

Debts due to friendly society by its officers.

The Friendly Societies Act, 1896 (*x*), replacing a similar provision contained in the Friendly Societies Act, 1875 (*y*), provides that upon the death of any officer of a registered society or branch, having in his possession, by virtue of his office, any money or property belonging to the society or branch, his heirs, executors or administrators, shall, upon demand in writing of the trustees of the society or branch, or of any two of them, or of any person authorised by the society or branch, or by the committee thereof, to make the demand, pay the

(*u*) Chapter 38, s. 3. See *Re Booth*, *Fisher* v. *Shirley*, W. N. (1879), p. 108.

(*x*) 59 & 60 Vict. c. 25, s. 35.

(*y*) 38 & 39 Vict. c. 60, s. 15 (7). This is the Act to the provisions of which the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), is expressly made without prejudice. See *post*, p. 283; and see *Ex parte Edmunds*, *Re Atkins*, 46 L. T. (N.S.) 240, in which the earlier legislation upon the subject is reviewed.

money, and deliver over the property to the trustees of the society or branch in preference to any other debt or claim against the estate of the officer.

In order to give to a society a right of preference under this statute in respect of moneys received by an officer of the society, the receipt of such moneys by such officer must have been a duty attached to the office which he held (*z*). Provided that the moneys came to the deceased officer in the ordinary course of and by virtue of his office, it is immaterial that they were not retained in his possession *in specie* (*a*).

Debts due to savings bank by its actuary.

The Savings Bank Act, 1863 (*b*), provides that if any person appointed to any office in a savings bank, and being entrusted with the keeping of accounts, or having in his hands or possession, by virtue of his said office or employment, any monies or effects belonging to such savings bank or any deeds or securities relating to the same, shall die, his executors or administrators shall within forty days after demand made by two of the trustees of the said savings bank, deliver and pay over all monies and other things belonging to such savings bank to such person as the said trustees shall appoint, and shall pay out of the estates, assets, or effects of such person all sums of money remaining due, which such person received by virtue of his said office or employment before any other of his debts are paid or satisfied; and all such assets, lands, goods, chattels, estates, and effects shall be bound to the payment and discharge thereof accordingly. Having regard to the provisions of s. 10 of the Judicature Act, 1875 (*c*), incorporating into the administration of estates of deceased persons dying

(*z*) *Ex parte Fleet*, 4 De G. & Sm. 52; *Re Aberdein*, *Hagon* v. *Aberdein*, W. N. (1896), p. 154.

(*a*) *Ex parte Edmunds*, *Re Atkins*, *supra*.

(*b*) 26 & 27 Vict. c. 87, s. 14.

(*c*) 38 & 39 Vict. c. 77.

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insolvent the rules of bankruptcy (*d*), it is important in this connection to observe that by the Savings Banks Act, 1891 (*e*), it is provided that nothing in s. 40 of the Bankruptcy Act, 1883, shall affect the priority given by s. 14 of the Trustee Savings Bank Act, 1863, to the debts mentioned in that section.

Debts due to Metropolitan Paving Commissioners by treasurer or collector.

A further instance of a statute conferring a preference in the payment of debts is that of the Metropolis Act (*f*), which provides for payment, by the executors or administrators of any treasurer, collector or other officer, of all sums collected by the deceased and due from him to the Metropolitan Paving Commissioners in preference to any other debt.

Expenses of maintenance by guardians.

Guardians cannot claim as preferential creditors against the estate of a deceased pauper for expenses of maintenance incurred by them (*g*).

Crown, whether bound.

Inasmuch as the Crown is not mentioned in any of the above statutes, it would seem, according to the maxim that the King is not bound by statute unless expressed so to be (*h*), that the priority of the Crown is in nowise affected (*i*).

Regimental debts.

Special provisions are made by the Regimental Debts Act, 1893 (*k*), to meet the case of a person dying while subject to military law. In any such case it is provided that a committee of adjustment as therein prescribed shall (1) secure and make an inventory of all such of the effects of the deceased as are in camp

(*d*) See *post*, pp. 279, 283.

(*e*) 54 & 55 Vict. c. 21, s. 13, passed apparently in consequence of the decision in *Re Williams, Jones* v. *Williams*, 36 Ch. D. 573.

(*f*) 57 Geo. 3, c. 29, s. 51 (local Act), cited in Williams on Executors, (10th ed.), p. 758.

(*g*) *Laver* v. *Botham & Sons*, [1895] 1 Q. B. 59.

(*h*) Jenk. Cent. 307; Wing. Max. 1. See *Att.-Gen.* v. *Donaldson*, 10 M. & W. 123; *Ledsam* v. *Russell*, 1 H. L. Cas. 697.

(*i*) *Ex parte Amicable Society of Lancaster*, 6 Ves. 98.

(*k*) 56 Vict. c. 5.

or quarters, and, if the death occurs out of the United Kingdom, are within the regulation area as therein defined, and (2) ascertain the amount and provide for the payment of the preferential charges (as therein defined) on the property of the deceased (*l*). Such preferential charges are made payable (*m*) in preference to all other debts and liabilities, and, as among themselves, in the order therein mentioned. It is further provided (*n*) that so much only of the personal property of a person dying while subject to military law as remains after payment of the preferential charges shall be considered personal estate of the deceased with reference to the calculation of probate duty, or of any other duty, tax, or percentage, or for any of the purposes of administration. Any surplus will usually be handed over to and disposed of by the personal representatives of the deceased soldier (*o*).

SECTION III.

OF THE ADMINISTRATION OF EQUITABLE ASSETS IN PAYMENT OF DEBTS.

Distribution of equitable assets by personal representative.

Having, in due course of administration, which implies the exercise within due limits of the administrative rights or privileges of preference and retainer, exhausted so much of the estate to be administered as consists of legal assets in payment of the several debts entitled to preference by statute (*p*) or the common law (*q*), the personal representative must distribute the remaining equitable assets rateably among the creditors remaining unpaid, without preference and without regard to the degree or quality of their debts.

(*l*) Section 1.
(*m*) Section 2.
(*n*) Section 3.
(*o*) Sections 7—10.
(*p*) *Ante*, pp. 215, *et seq.*
(*q*) *Ante*, pp. 192, *et seq.*

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Origin of rule of equal distribution.

Equitable assets constitute in effect a trust fund for the payment of debts, consisting originally of such real estate as it was equally within the power of the testator to apply towards or withhold from the payment of his debts. Being therefore a fund for participation in which creditors were dependent upon the bounty of the testator, the rule of equal distribution was adopted by Courts of Equity as being most in accordance with the presumed intention of the testator that all his debts should be paid (*r*). In respect of equitable assets, moreover, no common law action can be brought against the personal representative, so that the argument *ab inconvenienti* for allowing to the personal representative a right of preference in the case of legal assets has no application in the distribution of equitable assets (*s*).

Application of rule to statutory real assets.

The same principle of distribution has been applied in the administration of such real estate as is made equitable assets by Sir John Romilly's Act (*t*), subject, of course, to the proviso of the Act (so long as it remained in force):

> ". . . that . . . all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands."

In 1870 Hinde Palmer's Act (*u*) took away the priority of specialty creditors, and from that time the proceeds of sale of real estate in the hands of the personal representative were applied in all respects as other equitable assets (*x*).

(*r*) *Deg* v. *Deg*, 2 P. Wms. 411. See *Hopton* v. *Dryden*, Pr. Ch. 179; *Case of the Creditors of Sir Charles Cox*, 3 P. Wms. 341; *Wilson* v. *Fielding*, 2 Vern. 763.

(*s*) See this argument referred to in *Re Samson, Robbins* v. *Alexander*, [1906] 2 Ch. 584, at pp. 590, 594.

(*t*) 3 & 4 Will. 4, c. 104.

(*u*) 32 & 33 Vict. c. 46. See *ante*, pp. 200, *et seq.*

(*x*) *Walters* v. *Walters*, 18 Ch. D. 182.

Judicature Act, s. 10, does not affect rule of administration to be observed by personal representative.

It may, and no doubt frequently will happen where the estate is to any great extent insolvent, that, before the stage in the administration of the estate has been reached at which equitable assets alone remain to be distributed, the protection of an administration order will have been obtained, or, a petition in bankruptcy presented, by some individual creditor on behalf of himself and all other creditors. Where this is the case the rules incorporated into the administration by the Court of the insolvent estates of deceased persons by s. 10 of the Judicature Act (*y*) will apply. The consideration of this section is reserved for a future chapter (*z*). It may here be observed, however, that the Act does not require that the personal representative shall out of Court observe the same rules as he is to observe in Court. In the language of LINDLEY, L.J., in *Re Hargreaves, Dicks* v. *Hare* (*a*), "Parliament has not in any way affected the administration of assets except in legal proceedings. It leaves executors to administer assets out of Court just as they did before; but it says that when you come to administer assets in Court, whether under a winding up or in bankruptcy, or under an administration order or decree, certain modifications shall be made. Certain alterations are made, and, speaking generally and rather roughly, it says that as regards debts proveable and the valuation of contingent debts and so on, the rules in bankruptcy are to apply, that is to say, there is to be one set of rules observed by the Court, whether in bankruptcy or in winding up or in administrations. It says nothing about the duties of executors where there is no administration in Court."

Contingent debts.

The Act, although incorporating the rule in bankruptcy admitting proof in respect of contingent debts

(*y*) 38 & 39 Vict. c. 77.

(*z*) *Post*, Chap. XI.

(*a*) 44 Ch. D. 236.

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at their assessed value, does not, therefore, prevent the personal representative from distributing the assets, in accordance with the settled practice (*b*), among creditors whose debts are presently payable without regard to the possible vesting of contingent debts of which he has notice (*c*).

Effect of Judicature Act, s. 10, upon equitable rule as to hotchpot.

The Act, however, is not without its effect upon the rights of creditors, even where, in the case supposed at the commencement of the present section, a fund consisting of equitable assets alone remains to be distributed. In such a case a right existed on the part of unpaid creditors to apply to the Court to have the assets marshalled under an order for administration so as to give full effect to their equitable rights as against creditors whose debts had been partly satisfied out of legal assets, the old rule of the Court of Chancery being that where a creditor, in exercise of his legal right, had obtained partial satisfaction of his debt out of legal assets in priority to the general body of creditors, he should not be allowed to prove for the balance of his debt in competition with the other creditors, against equitable assets, until he first brought into the general account the amount which he had already received out of legal assets (*d*). No such right appears to exist at the present day, the effect of the importation of the new rules of administration prescribed by the Judicature Act being apparently to exclude the old rule of the Court of Chancery to the effect above mentioned; with the result, that a creditor is now entitled to reap the full benefit of any advantage which he may have obtained at law prior to the commencement of the administration proceedings.

(*b*) See *post*, p. 225. (*c*) *Re Hargreave*, *supra*.

(*d*) *Wride* v. *Clarke*, 1 Dick. 382; *Deg* v. *Deg*, 2 P. Wms. 411; *Haslewood* v. *Pope*, 3 P. Wms. 323; *Chapman* v. *Esgar*, 1 Sm. & G. 575. See *Bain* v. *Sadler*, L. R. 12 Eq. 570.

Effect of Judicature Act, s. 10, upon equitable rule postponing payment of voluntary bond debt.

Again, although a creditor by bond without value was at law as much entitled to payment as a creditor by bond for value, and accordingly, apart from any equitable rule, would have ranked equally with the latter (*e*), it was the old and undoubted rule of the Court of Chancery that creditors for valuable consideration took precedence under an order for administration over those whose debts were not founded upon a valuable consideration (*f*); but this rule, it has recently been decided, is now abrogated (*g*).

(*e*) *Payne* v. *Mortimer*, 4 De G. & J. 447, 451, 453; *Re Whitaker* 42 Ch. D. 119, 124, 127 [C. A.].

(*f*) *Lomas* v. *Wright*, 2 My. & K. 769; *Watson* v. *Parker*, 6 Beav. 283; *Re Whitaker*, *Whitaker* v. *Palmer*, [1901] 1 Ch. 9 [C. A.].

(*g*) *Re Whitaker*, *Whitaker* v. *Palmer*, *supra*.

CHAPTER X.

OF CONTINGENT DEBTS AND DEATH DUTIES.

SECTION I.

Of Contingent Debts.

The funds available for the payment of debts in the hands of the personal representative having been pointed out, and the rules of law and equity relating to the distribution of those funds by the personal representative in cases of insolvency having been discussed, there remain to be considered the duties of the personal representative as regards the distribution of residue after payment of debts where the estate is solvent.

Provision for contingent liabilities and death duties when made.

Before proceeding to a final distribution among persons claiming as beneficiaries, the personal representative must first make provision for the payment of any contingent liabilities to which the estate is subject and which he has no power to liquidate *in presenti* (*a*). Secondly, he must provide for the payment of the several death duties prescribed by statute for which he is accountable.

Examples of contingent debts.

First, as to contingent debts. The most familiar examples of liabilities which may arise *in futuro*, and which are commonly referred to as contingent debts, are bonds conditioned for the payment of sums of money upon the happening of future events, life

(*a*) See as to the right of *cestui que trust* to compel a distribution, and as to the immunity of the personal representative acting under an order of the Court, *post*, pp. 227, 228.

annuities payable at fixed dates, and liabilities which may arise upon the future breach of covenants entered into by the deceased.

Debts presently payable must be discharged without regard to contingent debts.

Though termed "contingent" debts, these liabilities are not strictly debts at all, inasmuch as they import no present liability; and, accordingly, the payment of debts in a due course of administration must be continued by the personal representative, whether the estate be solvent or not, and by the Court also, unless, in the latter case, the estate is being administered as an insolvent estate (*b*), without any regard to the possible vesting of contingent claims.

Thus, where the condition of a bond is for the observance of covenants of which none are broken, it has been held that creditors by bond whose money is presently due (*c*), and even simple contract creditors (*d*), must be paid in full in due course of administration, without regard to the contingency of the future indebtedness of the estate under the former bond. So, also, as against annuitants, the general creditors are entitled to have the assets applied in satisfaction of their debts before any provision is made, out of assets, for the payment of any instalments of an annuity which may subsequently accrue due (*e*).

Upon a contingent debt becoming presently payable in the course of an administration, it will rank as against debts remaining unpaid in all respects as though it had been presently payable at the commencement of the administration (*f*).

(*b*) See *post*, pp. 269 *et seq.*

(*c*) Wentw. Off. Ex. (14th ed.), p. 278; 2 Swinb. (7th ed.), p. 837.

(*d*) *Lancy* v. *Fairechild*, 2 Vern. 101, citing *Eeles* v. *Lambert*, Al. 40. See 3 Bac. Abr. (7th ed.) 517.

(*e*) *Read* v. *Blunt*, 5 Sim. 567. See *Re Hargreaves, Dicks* v. *Hare*, 44 Ch. D. 236 [C. A.].

(*f*) Wentw. Off. Ex. (14th ed.), p. 279.

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Contingent debt will not support administration action.

A contingent debt will not support either an action or summons for administration. Thus, where a testator died leaving assets of the net amount of £4,350, and presently indebted to the extent of £1,860, it was held that the owner of an annuity charged upon the estate, and of a capital value estimated at £8,386, must be content to receive the quarterly payments of her annuity as they became due so long as there remained sufficient assets for the purpose (*g*); although, if it had happened that an order for administration had been made at the suit of a creditor, the annuitant would have been entitled to prove in competition with the other creditors for the estimated value of her annuity in accordance with the rules regulating the administration by the Court of the insolvent estates of deceased persons (*h*).

Representative must provide for contingent debts before proceeding to distribution.

So far, however, as there remains any surplus after payment of debts presently due, it will be incumbent upon the personal representative, unless acting under the direction of the Court, to set aside sufficient assets to meet contingent claims, of which he has notice, before proceeding to final distribution among beneficiaries (*i*).

With regard to all contingent debts and liabilities other than those hereafter mentioned, which are by statute excepted from the general rule, it is clear that a personal representative, having notice of a liability of the testator in an event which may possibly happen (however remote the contingency may be) cannot safely upon his own responsibility pay legacies or residue without providing for the contingent liability (*k*). If he does so, he will have no defence to plead to an action brought against him as personal representative upon the covenant or bond when the contingent

(*g*) *Re Hargreaves, Dicks* v. *Hare*, 44 Ch. D. 236 [C. A.].

(*h*) *Ibid.*; *Re Beeman, Fowler* v. *James*, [1896] 1 Ch. 48. See as to administration of insolvent estates by the Court, *post*, pp. 269 *et seq.*

(*i*) *Post*, p. 452.

(*k*) *Hawkins* v. *Day*, Amb. 160; *Dean* v. *Allen*, 20 Beav. 1.

liability has ripened into a certain claim (*l*). Thus, in *Taylor* v. *Taylor* (*m*), a testator held shares, not fully paid up, in a joint stock banking company which was a going concern at the time of his death; his executors retained the shares, and, having no reason to believe that any liability in respect of the shares was likely to arise, paid a legacy without setting aside any part of the testator's estate to meet future calls. The bank subsequently stopped payment, and the executors were placed on the list of contributories. It was held that the executors were not justified in paying the legacy without setting apart a sufficient sum to meet the contingent liability attaching to the shares, and that they must pay the amount of the legacy themselves to the official liquidator in satisfaction of calls.

Distribution of residue under order of Court.

In such circumstances as the above, application may be made to the Court (*n*) for leave to proceed to a distribution without making provision for the contingent debt, and it is the practice of the Court to direct such distribution notwithstanding the existence of contingent claims (*o*).

Whether fund to be retained for indemnity of personal representative.

Where the circumstances are such that an order of the Court will not absolve the personal representative from personal responsibility, the Court will not compel the personal representative to pay legacies or distribute residue unless he has first set aside or raised out of the assets a sufficient sum to meet contingent liabilities of which he may have notice, or has been furnished with an adequate indemnity against any such liabilities (*p*).

(*l*) *Knatchbull* v. *Fearnhead*, 3 My. & C. 122; *Taylor* v. *Taylor*, L. R. 10 Eq. 477. See *Whittaker* v. *Kershaw*, 45 Ch. D. 320, 321.

(*m*) L. R. 10 Eq. 477.

(*n*) R. S. C., O. LV., r. 3.

(*o*) *Re King, Mellor* v. *South Australian Land, etc. Co.*, [1907] 1 Ch. 72.

(*p*) *Simmons* v. *Bolland*, 3 Mer. 547; *Hawkins* v. *Day*, *ibid.*, 555 n.; Amb. 160; *Vernon* v. *Lord Egmont*, 1 Bli. (N.S.) 554; *Cochrane* v. *Robinson*, 11 Sim. 378; *Fletcher* v. *Stevenson*, 3 Hare, 360; *Dobson* v. *Carpenter*, 12 Beav. 370; *Hickling* v. *Boyer*, 3 M. & G. 635; *Dean* v. *Allen*, 20 Beav. 1.

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Where, however, the order of the Court directing an immediate distribution is itself a complete indemnity to the personal representative, it is not the practice of the Court to require any portion of the assets to be retained either as a further indemnity to the personal representative or for the protection of future creditors (*q*).

Order of Court a complete indemnity.

An order of the Court made in an administration action will exonerate the personal representative from ultimate liability in all cases where there is no personal liability on his part to pay out of his own moneys the claim of the future creditor (*q*).

Protection of personal representative on sale of term, etc. in respect of covenants to which he is liable as such.

By ss. 27 and 28 of Lord St. Leonard's Act (*r*), it is provided with regard to rents, covenants, and agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate, or in conveyances on chief rent or rentcharge, that where all liabilities that have accrued due and been claimed shall have been satisfied, and a sufficient fund set apart to answer any fixed and ascertained sums covenanted or agreed by the lessee or grantee to be laid out on the property demised or agreed to be demised, or conveyed or agreed to be conveyed, as the case may be, although the period for laying out the same may not have arrived, and the lease or agreement for a lease shall have been assigned, or the property conveyed to a purchaser, the residue of the estate may be distributed amongst the parties entitled thereto respectively, without any appropriation being made to meet any future liability under the lease, agreement for lease, or conveyance, and the personal representative upon such distribution will be freed from all personal liability in respect of any future claim thereunder (*s*).

(*q*) *Re Nixon, Gray* v. *Bell*, [1904] 1 Ch. 638; *Re King*, [1907] 1 Ch. 72.
(*r*) 22 & 23 Vict. c. 35.
(*s*) *Smith* v. *Smith*, 1 Drew. & Sm. 384: *Re Green*, 2 De G. F. & J. 121.

And by s. 3 (1) of the Land Transfer Act, 1897 (*t*), it is provided that—

Provision for transfer to heir or devisee.

> "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance."

SECTION II.

OF ESTATE DUTY (*u*).

The death duties payable in respect of the property of persons dying after August 1st, 1894, are estate duty (including settlement estate duty), legacy duty, and succession duty.

Principle upon which estate duty is imposed.

The first mentioned duty is imposed upon the principle that, whenever property changes hands on death, the State is entitled to step in and take toll of the property as it passes, without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding (*x*). The amount of the duty payable cannot, therefore, be affected by any dispositions contained in the will of the deceased person. Such dispositions need only be referred to in connection with

(*t*) 60 & 61 Vict. c. 65.

(*u*) As to the incidence of this duty, see *post*, pp. 381 *et seq.*

(*x*) *Earl Cowley* v. *Inland Revenue Commissioners*, [1899] A. C. 198, 211.

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estate duty, for the purpose of ascertaining the ultimate incidence of the duty.

Principle upon which legacy and succession duty are imposed.

The last mentioned duties, on the other hand, are a tax upon the several dispositions of property contained in the will of the deceased, or the shares in which property is distributable upon intestacy, the rate of which is made to vary according to the relationship of the beneficiary to the testator.

Description of estate duty.

Subject to certain exceptions or savings, the estate duty imposed by the Finance Act, 1894 (*y*), as amended by the Finance Act, 1896 (*z*), is a duty to be levied at the graduated rates therein mentioned (*a*), upon the principal value (*b*) of all the property real or personal, settled or unsettled (*c*), passing (*d*), or deemed to pass (*e*), upon the death of any person dying after August 1st, 1894 (*f*).

Duties superseded by estate duty.

In respect of property chargeable with estate duty, the following duties will cease to be payable (*g*), viz.: Probate duty (*h*), account duty (*i*), additional succession duty (*k*), temporary estate duty (*l*), and one per cent. legacy or succession duty (*m*).

Property which "passes" on death.

Section 1 of the Act refers only to property "which passes" on death, and gives effect to the principle of the Act above stated.

Where, therefore, a father and son being tenant for life and tenant in tail respectively of certain estates, joined in executing a disentailing deed under which a

(*y*) 57 & 58 Vict. c. 30.
(*z*) 59 & 60 Vict. c. 28.
(*a*) Section 4.
(*b*) Section 7.
(*c*) See *Earl Cowley* v. *Inland Revenue Commissioners*, [1899] A. C. 198, at p. 212.
(*d*) Sections 1, 22 (1).
(*e*) Section 2.
(*f*) Sections 1, 24.
(*g*) Section 1. See First Schedule.
(*h*) 44 & 45 Vict. c. 12.
(*i*) 52 & 53 Vict. c. 7, s. 11.
(*k*) 51 & 52 Vict. c. 8.
(*l*) 52 & 53 Vict. c. 7, ss. 5, 6.
(*m*) See *post*, pp. 263, 268.

power was limited to them to sell or mortgage jointly, and subsequently joined in mortgaging the estates to a company for their joint benefit; and they afterwards executed a deed of resettlement by which the estates became charged with an annuity to the son payable during the father's life, and subject thereto were declared to be held in trust for the father for life, and after his death, for the son for life with remainders over, it was held by the House of Lords, reversing the decision of the Court of Appeal, that upon the father's death in 1895, the case fell exclusively within this section, and that the settled property which passed to the son by reason of the death of his father, was only the equity of redemption, and that estate duty was accordingly payable only upon the equity of redemption, and not upon what would have been the gross value of the estates had no mortgage existed (*n*).

Property deemed to pass upon death.

Section 2 of the Act "is merely subsidiary and supplemental. It was intended apparently to sweep in a few cases which were thought perhaps to be within the spirit, though not within the letter of the proposed enactment, or else were supposed likely to lead to evasion if not made equally subject to estate duty. Section 2 therefore declares that the expression 'property passing on the death of the deceased' shall be '*deemed* to include' property classified under four different heads, to no one of which rightly understood is that expression literally applicable" (*o*). It extends to all cases where a survivor of the deceased "derives a benefit by reason of the death of the deceased dependent upon and emerging upon the death of the deceased" (*p*).

(*n*) *Earl Cowley* v. *The Commissioners of Inland Revenue*, [1899] A. C. 198. See *Att.-Gen.* v. *Lord Montagu*, [1904] A. C. 316, at p. 319.

(*o*) *Per* Lord MACNAGHTEN in *Earl Cowley* v. *Inland Revenue Commissioners*, *supra*, at p. 211.

(*p*) *Per* Lord WATSON in *Att.-Gen.* v. *Beech*, [1899] A. C. 53, 59.

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Estate duty may thus become leviable upon property which can never come under the control of the personal representative, and for which the latter is not, of course, made accountable by the Act. The personal representative is, however, required "to the best of his knowledge and belief" to specify in appropriate accounts annexed to the Inland Revenue affidavit, all the property in respect of which estate duty is payable upon the death of the deceased (*q*), and it will therefore be convenient in the present place to indicate shortly what property is deemed to pass upon death, for the purposes of the Act.

Property deemed to pass under s. 2 (1) (a).

By s. 2 (1) of the Finance Act, 1894, it is enacted that:

> "Property passing on the death of the deceased (*r*) shall be deemed to include the property following, that is to say:
>
> "(a) Property of which the deceased was at the time of his death competent to dispose."

It appears from the definition clauses contained in s. 22 of the Act, that the above sub-section is intended to include, beyond real and personal property actually passing upon death, mentioned in s. 1 of the Act: (1) Property over which the deceased had, or if he had been *sui juris*, would have had, a disposing power as tenant in tail, whether in possession or not, but subject in the latter case, to the exemption contained in s. 5 (3) of the Act in favour of interests failing before becoming interests in possession (*s*); (2) Property over which the deceased had, or if he had been *sui juris*, would have had, a general power of appointment, whether exercisable by instrument *inter vivos* or by

(*q*) Section 8 (3).

(*r*) The expressions "deceased person" and "the deceased," contained in this and the following sections of the Act, mean a person dying after August 1st, 1894. See ss. 22, 24.

(*s*) See *Att.-Gen.* v. *Wood*, [1897] 2 Q. B. 102; *Att.-Gen.* v. *Glossop*, [1907] 1 K. B. 163 [C. A.]; *post*, p. 242.

will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as tenant for life under the Settled Land Act, 1882, or as mortgagee; and (3) Money which a person has a general power to charge on property (*t*).

The sub-section has been held to include property passing under a devise by virtue of the operation of s. 33 of the Wills Act (*u*).

Property deemed to pass under s. 2 (1) (b).

> "(b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole."

The expression "on the death" is expressed to include "at a period ascertainable only by reference to the death" (*x*).

The words "to the extent to which a benefit accrues or arises by the cesser of such interest" qualify the earlier words of the section and limit the operation of the word "ceasing" by confining it to cases where something passes, and to the extent to which anything does pass. They in no sense make the duty a duty on the succession. The subsequent words of the sub-section deal with, and except, cases in which there is in a sense something passing, though not in the sense in which "passing" is intended to be used in the Act (*y*).

(*t*) See *Lord Advocate* v. *Moray*, [1905] A. C. 531.

(*u*) *Re Scott*, [1901] 1 Q. B. 228 [C. A.].

(*x*) Section 22 (1).

(*y*) *Per* RIGBY, L.J., in *Re Earl Cowley's Estate*, [1898] 1 Q. B. 355, at p. 376. See [1899] A. C. 198; and see further on this sub-section, *Re Townsend*, [1901] 2 K. B. 331.

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In *Att.-Gen.* v. *Beech* (*z*), the interest referred to in the words "property in which the deceased or any other person had an interest ceasing on the death of the deceased" was paraphrased as being "an interest in him or her or another at his or her death which did not cease except with his or her lifetime," and it was accordingly held, that where a tenant for life with power of appointment over settled property, appointed to her son subject to her life interest, and subsequently, but more than twelve months prior to her death, surrendered her life interest to the trustees of the settlement to the end and intent that such life interest might merge in the interest in remainder of her son, upon the death of the tenant for life, no benefit accrued or arose by the cesser of her interest within the meaning of this sub-section, and no estate duty was payable by the son.

In *Att.-Gen.* v. *De Préville* (*a*), the principle of the above decision was applied to the case of a surrender by a tenant for life in favour of the remainderman, made less than twelve months prior to the death of the tenant for life.

In the case, however, of every person dying after March 31st, 1900, property "deemed to pass" on death has been made to include not only property in which the deceased or any other person had an interest *ceasing* on the death of the deceased, but also property in which the deceased or any other person had an estate or interest *limited to cease* on the death of the deceased "notwithstanding that that estate or interest has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting or disposition was *bonâ*

(*z*) [1899] A. C. 53. (*a*) [1900] 1 Q. B. 223 [C. A.].

fide made or effected twelve months before the death of the deceased, and *bonâ fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise" (*b*).

It is apparent that the words of the sub-section include the case of the cesser of an interest or interests created by the settlor himself and the consequent accrual of a benefit to the settlor by way of reverter to him of the settled property, whether under an express ultimate limitation, or by virtue of a resulting trust, in his favour; also the case of the cesser upon the death of a husband, of any life interest in his wife's real estate to which he was entitled in right of his wife.

By the amending Act of 1896 (*c*) these somewhat harsh results of the sub-section have been remedied, and it is provided in effect that upon the death of any person after July 1st, 1896, entitled to a life or other interest determinable at death in property under a disposition creating no other interest, and by virtue of which the deceased entered into and retained possession to the entire exclusion of the disponer, the property reverting to the disponer in his lifetime is not to be deemed to pass by reason only of such reverter unless "the person or persons taking the said life or determinable interest, had at any time prior to the disposition been himself or themselves competent to dispose of the said property"; and further, that upon a husband so dying in the lifetime of his wife, real property (as defined by s. 1 of the Succession Duty Act, 1853 (*d*)), to the rents

(*b*) 63 Vict. c. 7, s. 11.
(*c*) 59 & 60 Vict. c. 28, s. 15.
(*d*) 16 & 17 Vict. c. 51.

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and profits whereof the husband was entitled by law, shall not be deemed to pass upon his death by reason of the wife then becoming entitled to the property by virtue of her former interest.

Where by a marriage settlement, the first life interest in the wife's property is limited to the husband subject to the payment of an annuity to the wife, and trusts are declared of the property to take effect after the death of the survivor of husband and wife in favour of children of the marriage, it has been held that the above section affords no defence to the claim of the Crown for estate duty (*e*); but that so much only of the wife's fortune as formed part of the capital which produced the annuity is exempt from estate duty (*f*).

Property deemed to pass under s. 2 (1) (c).

"(c) Property which would be required on the death of the deceased to be included in an account under section thirty-eight of the Customs and Inland Revenue Act, 1881, as amended by section eleven of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

Under the above sub-section, only such property is to be brought into account as would have had to be brought into account if it had not been given away within twelve months of the death. Where, therefore, a life estate was released within twelve months of the death of the tenant for life, it was held that estate duty was not payable by the remainderman under this sub-section, inasmuch as, if no release had ever been made the life estate must have determined *ipso facto* upon the death of the tenant for life and there would have been nothing to bring into account (*g*). Estate

(*e*) *Att.-Gen.* v. *Penrhyn*, 83 L. T. 103; *Att.-Gen.* v. *Glossop*, [1907] 1 K. B. 163 [C. A.].

(*f*) See 57 & 58 Vict. c. 30, s. 5 (3), *post*, p. 242.

(*g*) *Att.-Gen.* v. *De Préville*, [1900] 1 Q. B. 223 [C. A.].

duty is now, however, expressly imposed under such circumstances in the case of any person dying after March 31st, 1900 (*h*).

The sections referred to in the sub-section above set out were aimed against evasions of the then existing death duties, effected by means of gifts *mortis causâ* and other subterfuges.

Paragraph (a) of s. 38 (2) of the Customs and Inland Revenue Act, 1881 (*i*), as amended by s. 11 of the Customs and Inland Revenue Act, 1889 (*k*), as it now stands, incorporated into the above sub-section, may be read as follows:

"The real, personal, or movable property to be included in an account shall be property of the following descriptions, namely, (a) Any property . . . taken under a disposition . . . made by a person dying after the 1st August, 1894, purporting to operate as an immediate gift *inter vivos* . . . which shall not have been *bonâ fide* made twelve months before the death of the deceased, or, property taken under any gift whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise" (*l*); and this has been construed to mean (*m*) "that if there be a gift, no matter when made, of property *inter vivos*, then the property must be included in an account, and therefore liable to estate duty, unless the donee

(*h*) 63 Vict. c. 7, s. 11. See *supra*.

(*i*) 44 & 45 Vict. c. 12.

(*k*) 52 Vict. c. 7.

(*l*) *Att.-Gen.* v. *Earl Grey*, [1898] 2 Q. B. 534 [C. A.]. See *Att.-Gen.* v. *De Préville*, *supra*.

(*m*) *Per* A. L. SMITH, L.J., in *Att.-Gen.* v. *Earl Grey*, [1898] 2 Q. B. 534, at p. 541; affirmed [1900] A. C. 124. See *Att.-Gen.* v. *Johnson*, [1903] 1 K. B. 617 [C. A.]; *Att.-Gen.* v. *Holden*, [1903] 1 K. B. 832; *Att-Gen.* v. *Cobham*, 90 L. T. 816.

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has *bonâ fide* assumed possession and enjoyment of the property immediately upon the gift, and has thenceforward retained the possession and enjoyment thereof to the entire exclusion of the donor, or if he has taken and retained the possession to the entire exclusion of the donor, then that this possession and enjoyment has been without any benefit by contract or otherwise to the donor."

The remaining paragraphs of s. 38 (2) as amended and added to by the Act of 1889 and incorporated into the above sub-section are summarised in Hanson's Death Duties (*n*) as follows:

"(b) Any property which a person dying after such day, having been absolutely entitled thereto, has caused or may cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, including any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement with any other person, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person.

"(c) Any property passing under any past or future settlement (including any trust whether expressed in writing or otherwise) made by any person dying after such day, by deed or any other instrument not taking effect as a will, whereby an interest in such property, or the proceeds of sale thereof, for life or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to

(*n*) (5th ed.), by Dibdin and Errington, p. 110. See *Att.-Gen.* v. *Johnson*, [1902] 1 K. B. 416, at p. 423.

himself, or to reclaim the absolute interest in such property or the proceeds of sale thereof.

"The charge under the said section shall extend to money received under a policy of assurance effected by any person dying after the first day of August, 1894, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

The concluding clause of paragraph (c) has been held applicable where a power of revocation was reserved, although the conditions upon which the power was expressed to be exercisable had not happened at the time of the settlor's death (*o*).

Property deemed to pass under s. 2 (1) (d).

"(d) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

The general purpose of this sub-section is to prevent a man escaping estate duty by subtracting from his means, during life, moneys or money's worth, which, when he dies, are to reappear in the form of a beneficial interest accruing or arising on his death (*p*).

Sums payable under a policy of insurance effected by the deceased on his own life are "an interest purchased or provided by the deceased" within this section (*q*). Where, however, a father effected a policy of insurance in his own name on the life of his son and paid all

(*o*) *Att.-Gen.* v. *Earl Grey*, [1898] 2 Q. B. 534 [C. A.]; affirmed [1900] A. C. 124.

(*p*) *Lethbridge* v. *Att-Gen.*, [1907] A. C. 19, 23.

(*q*) *Att.-Gen.* v. *Hawkins*, [1901] 1 Q. B. 285. See *Att.-Gen.* v. *Dobree*, [1900] 1 Q. B. 442; *Att.-Gen.* v. *Murray*, [1904] 1 K. B. 165, [C. A.].

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premiums becoming due thereon, and subsequently, upon the son's marriage, assigned to the trustees of the settlement executed upon the occasion thereof the policy of insurance and all money assured or to become payable under it upon trust after the son's death to invest the insurance moneys and pay the income to his wife for life, it was held that the insurance moneys paid on the son's death were not an "interest purchased or provided by the deceased" in concert or by arrangement with his father; COZENS-HARDY, L.J., in delivering the judgment of the Court, observing "We are not prepared to hold that on a marriage settlement everything brought into settlement on the husband's side by his father or other relatives can properly be said to be provided by the husband in concert or by arrangement with his father or other relatives" (*r*).

Where, in pursuance of a family arrangement, a son became the purchaser for full consideration from his father of policies effected by the father upon his own life, it was held that the claim of the Crown for payment of estate duty in respect of the policy moneys upon the father's death, under this sub-section, could not be supported (*s*).

By a subsequent section (*t*), it is provided that a single annuity not exceeding £25 purchased or provided by the deceased, either by himself alone, or in concert or arrangement with any other person, for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other person, and any pension or annuity payable by the Government of British India to the widow or child of any deceased officer of such Government, notwith-

(*r*) *Att.-Gen.* v. *Murray*, *supra*.

(*s*) *Lethbridge* v. *Att-Gen.*, *supra*.

(*t*) Section 15 (1), (3). See *Att.-Gen.* v. *Dobree*, *supra*, at p. 449; *Att.-Gen.* v. *Murray*, *supra*, at p. 173.

standing that the deceased contributed during his lifetime to any fund out of which such pension or annuity is paid, shall be exempted from the payment of estate duty.

Such are the several classes of property in respect of which estate duty is generally leviable.

Property not deemed to pass upon death.

The remaining sub-sections of s. 2 of the Act of 1894 except from the operation of the Act property situate out of the United Kingdom other than property in respect of which, under the law in force before the passing of the Act, legacy or succession duty is payable, or would be so payable but for the relationship of the person to whom it passes; and property held by the deceased as trustee for another person under a disposition not made by the deceased, or under a disposition made by the deceased more than twelve months before his death where possession and enjoyment of the property was *bonâ fide* assumed by the beneficiary immediately upon the creation of the trust, and thenceforward retained to the entire exclusion of the deceased, or of any benefit to him by contract or otherwise. And s. 3 of the Act further excepts from liability to estate duty property passing on death by reason only of certain transactions for money consideration, that is to say, property bought from the deceased and paid for in his lifetime, but the delivery of which to the purchaser has been for some reason postponed (*u*).

Further savings and exceptions from the operation of the Act, of more or less importance, in favour of particular persons, interests, and articles, are to be found scattered throughout the Act of 1894 and the

(*u*) *Att.-Gen.* v. *Dobree*, [1900] 1 Q. B. 442, 450. See *Att.-Gen.* v. *Smith-Marriott*, [1899] 2 Q. B. 595; *Att.-Gen.* v. *Hawkins*, [1901] 1 Q. B. 285; *Att.-Gen.* v. *Johnson*, [1903] 1 K. B. 617 [C. A.]; and compare *Lethbridge* v. *Att.-Gen.*, [1907] A. C. 19.

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amending Act of 1896, and are as follows: Property of common seamen, marines, or soldiers who are slain or die in the service of his Majesty, and sums under £100 which by virtue of particular Acts may be paid without representation (*x*): Property to the income of which a husband or wife is entitled, either solely or jointly with the other under a disposition made by him or her which has taken effect before August 1st, 1894, and to the income of which, on the death of the one, the settlor surviving becomes entitled (*y*): Settled property in respect of which estate duty has already been paid since the date of the settlement until the death of a person who had been competent to dispose of such property (*z*): Settled property in respect of which the deceased had an interest which failed or determined by reason of his death before it became an interest in possession, provided that subsequent limitations under the settlement continue to subsist (*a*): Property settled by any will or disposition made by a person dying before August 1st, 1894, in respect of which any probate duty or account stamp duty has been paid or is payable, unless in either case the deceased was at the time of his death, or, at any time since the will or disposition took effect, had been

(*x*) 57 & 58 Vict. c. 30, s. 8 (1). See further, as to cases of death after October 11th, 1899, 63 Vict. c. 7, s. 14.

(*y*) 57 & 58 Vict. c. 30, s. 21 (5). See *Att.-Gen.* v. *Wood*, [1897] 2 Q. B. 102, 110. The sub-section does not apply where the settlor surviving becomes entitled to the *corpus* as well as to the income of the property settled (*Att.-Gen.* v. *Strange*, [1898] 2 Q. B. 39; *Att.-Gen.* v. *Glossop*, [1906] 1 K. B. 284, at pp. 290, 291, affirmed [1907] 1 K. B. 163 [C. A.]).

(*z*) 57 & 58 Vict. c. 30, s. 5 (2); 61 & 62 Vict. c. 10, s. 13. See *Inland Revenue Commissioners* v. *Priestley*, [1901] A. C. 208. As to the meaning of the words "competent to dispose," see *Att.-Gen.* v. *Hay*, [1899] 2 Q. B. 245. As to estate duty payable in respect of property inalienably settled by Act of Parliament, see s. 5 (5) (*Re Bolton Estates Act*, 1863, [1904] 2 Ch. 289).

(*a*) 57 & 58 Vict. c. 30, s. 5 (3). See *Att.-Gen.* v. *Wood*, [1897] 2 Q. B. 102; *Att.-Gen.* v. *Glossop*, [1907] 1 K. B. 163 [C. A.]. See *Att.-Gen.* v. *Power*, [1906] 2 I. R. 272.

competent to dispose of the property (*b*): Interests in expectancy in any property, which has been *bonâ fide* sold or mortgaged for full consideration in money or money's worth before August 1st, 1894 (*c*): Advowsons or church patronages which would have been free from succession duty under s. 24 of the Succession Duty Act, 1853 (*d*): Property consisting of such pictures, prints, books, manuscripts, works of art, scientific collections, or other things not yielding income, as appear to the Treasury to be of national, scientific, or historic interest, settled so as to be enjoyed in kind in succession by different persons, while enjoyed in kind by a person not competent to dispose of the same (*e*).

"Estate by itself."

The following property is not exempted from estate duty, but is to be rated upon its own principal value instead of upon the principal value of all the property upon which duty is leviable, viz., property passing "in which the deceased never had an interest" (*f*), and, in cases not falling within the amending Act of 1900, property "which under a disposition not made by the deceased passes immediately on the death of the deceased to some person other than the wife, or husband, or a lineal ancestor or lineal descendant of the deceased (*g*). Property so rated separately is termed an estate by itself.

Small estate.

And by s. 16 (3) it is further provided that—

> "Where the net value of the property, real and personal, in respect of which estate duty is payable on the death of the deceased, exclusive of property settled

(*b*) 57 & 58 Vict. c. 30, s. 21 (1). See *Att.-Gen.* v. *Dodington*, [1897] 2 Q. B. 373, 381 [C. A.]; *Att.-Gen.* v. *Earl of Londesborough*, [1905] 1 K. B. 98 [C. A.].

(*c*) 57 & 58 Vict. c. 30, s. 21 (3). See *Re Vernon*, [1901] 1 Q. B. 297.

(*d*) *Ibid.*, s. 15 (4).

(*e*) 59 & 60 Vict. c. 28, s. 20 (1); *Re Leconfield*, 90 L. T. 399.

(*f*) 57 & 58 Vict. c. 30, s. 4; 63 Vict. c. 7, s. 12.

(*g*) 57 & 58 Vict. c. 30, s. 4.

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otherwise than by the will of the deceased, does not exceed one thousand pounds, such property, for the purpose of estate duty, shall not be aggregated with any other property, but shall form an estate by itself . . "

"Fixed duty."

Lastly, where the gross value of the property, real and personal, in respect of which estate duty is payable on the death of the deceased, exclusive of property settled otherwise than by the will of the deceased, does not exceed £500, a "fixed duty" of 30*s*. or 50*s*., according to whether the gross value is under or over £300, is substituted for estate duty (*h*).

Allowance for funeral expenses, debts, and incumbrances.

The main principle of the Act—to levy a duty upon the principal value of the property actually passing upon death—is further carried out by s. 7 of the Act. By this section, allowance is to be made for reasonable funeral expenses and for debts and incumbrances to the extent, it would seem, to which the property passing subject to such debts and incumbrances is *bonâ fide* reduced in value. Thus, where the deceased was possessed of property subject to a *bonâ fide* mortgage, the property, for the purposes of the Act, passing upon his death, was held to be the equity of redemption only (*i*).

Where, however, a tenant for life and remainderman joined in a mortgage of the settled property, the mortgage money being paid to the remainderman and the latter covenanting to indemnify the tenant for life against both principal and interest, with the result that in substance there was, as between tenant for life and remainderman, no mortgage, and that, upon the death of the tenant for life, the remainderman "obtained the estate without the mortgage affecting him, or at all events obtained the benefit of it to a greater degree

(*h*) 57 & 58 Vict. c. 30, s. 16 (1). See 3 Edw. 7, c. 46, s. 14.

(*i*) *Earl Cowley* v. *Commissioners of Inland Revenue*, [1899] A. C. 198.

than during her life," it was held that, in estimating the principal value of the property, no deduction ought to be made on account of the mortgage debt (*k*).

Statement by representative in account annexed to affidavit of property subject to duty.

It thus appears that, in the statement of the personal representative required to be annexed to the Inland Revenue affidavit (*l*) of the property in respect of which estate duty is payable, he must specify any property which, to the best of his knowledge and belief, passes, or by virtue of s. 2 of the Act of 1894, or s. 11 of the Act of 1900, is deemed to pass, upon the death of the deceased (unless such property falls within any of the several exceptions referred to), and any expenses, debts, or incumbrances in respect of which, under s. 7, allowance is to be made.

Where the personal representative does not know the amount or value of any property which has passed on the death, he may state that such property exists, but that he does not know the amount or value thereof, and that he undertakes, as soon as the amount and value are ascertained, to bring in an account thereof, and to pay both the duty for which he is or may be liable thereon, and any further duty payable upon the ascertained property if it is found that the value of the unascertained property causes a higher rate of duty to become leviable (*m*).

Liability of representative to account for and pay estate duty.

It remains to consider to what extent a personal representative is accountable for estate duty and to indicate the powers and duties conferred and imposed upon him in connection with the payment thereof.

It is to be observed that estate duty, unlike the original probate duty which it displaces, is not merely

(*k*) *Att.-Gen.* v. *Lord Montagu*, [1904] A. C. 316, 322.
(*l*) 57 & 58 Vict. c. 30, s. 8 (3).
(*m*) *Ibid.*, s. 6 (3).

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a stamp duty, but is one for which the personal representative is personally accountable (*n*).

By s. 6 (2) of the Finance Act, 1894, it is enacted that—

> "The executor (*o*) of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit, and may pay in like manner the Estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment."

And by s. 8 (3) of the same Act, after requiring the personal representative to specify, to the best of his knowledge and belief, in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate duty is payable, it is enacted that the personal representative

> ". . . shall be accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has received as executor (*o*), or might but for his own neglect or default have received."

Leaving out of consideration, for the moment, any effect which the provisions of the Land Transfer Act, 1897, may have upon these sections, their combined effect appears to be that the personal representative in his capacity as such must pay, on delivering the necessary affidavit, and, to the extent of the assets which as personal representative he has received or ought to have received, is personally accountable for the estate

(*n*) See *Re Kingdom and Wilson*, [1902] 2 Ch. 242, at p. 257 [C. A.].
(*o*) The expression includes "administrator": s. 22 (d).

duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death (*p*); and that he may pay "in like manner," that is to say on delivering the affidavit, the estate duty on other property coming under his control by virtue of any testamentary disposition, that is to say, upon real estate devised to him in the capacity of trustee; and, further, that upon the request of the persons accountable he may at the same time pay the estate duty upon the remaining property passing on the death of the deceased.

In respect of real estate of which the personal representative has acquired control as trustee under the testator's will, he may further become accountable for estate duty, as such trustee, under s. 8 (4) of the Act of 1894, whereby it is enacted that—

> "Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property, and shall, within the time required by this Act or such later time as the Commissioners allow, deliver to the Commissioners and verify an account, to the best of his knowledge and belief, of the property: Provided that nothing in this section contained shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of property."

Estate duty payable by persons accountable under this sub-section is to be collected upon an account

(*p*) See *Re Countess of Orford, Cartwright* v. *Duc del Balzo*, [1896] 1 Ch. 257, 262.

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setting forth the particulars of the property and delivered to the Commissioners within six months after the death, or within such further time as the Commissioners may allow (*q*), and may be paid by instalments (*r*).

Effect of Land Transfer Act upon ss. 6 (2) and 8 (4) of the Finance Act.

It will be observed that the provisions of the Finance Acts, 1894 and 1896, do not contemplate the change in the law of devolution introduced by the Land Transfer Act, 1897; and that the sections of the Finance Act dealing with "persons accountable," are not framed to meet the case of real estate devolving immediately by law upon the personal representative. It may be doubted (*s*), however, whether the provisions of the Land Transfer Act, rightly construed, effect any very considerable alteration in the law either as regards the discretionary power of the personal representative to pay estate duty under s. 6 (2), or as regards the personal representative's liability to account as trustee under s. 8 (4).

Section 5 of the Land Transfer Act, enacting that nothing in this part of this Act shall affect any duty payable in respect of real estate or impose on real estate any other duty than is now payable in respect thereof, appears to be directed only to the amount and ultimate incidence of any duty payable, and does not, therefore, afford much assistance in arriving at the proper construction, having regard to the altered state of the law relating to the devolution of real estate, of the particular sections in question.

As regards the discretionary power of the personal representative to pay estate duty in respect of property

(*q*) 57 & 58 Vict. c. 30, s. 6 (4).

(*r*) *Ibid.* s. 6 (8). See *Re Earl Howe's Settled Estates*, [1903] 2 Ch. 69.

(*s*) It is right to observe that a different view as to the effect of the Land Transfer Act upon these sections is taken by the learned editors of Hanson's Death Duties. See 5th ed., pp. 154, 155.

coming under his control "by virtue of any testamentary disposition of the deceased," it may be argued no doubt, that the mere appointment of an executor is a testamentary disposition by virtue of which, and of s. 1 of the Land Transfer Act, all real estate within the meaning of that Act comes under the control of the executor. But, although the appointment of an executor constitutes a testamentary disposition of personal chattels, it seems incorrect to say that such an appointment is a testamentary disposition of real estate, which is now made to devolve on the personal representatives or representative for the time being of the deceased owner, notwithstanding any testamentary disposition. The property is disposed of by the Act and not by the testament, although, in giving effect to the Act, regard must be had to the appointment of executors contained in the will. On the other hand, an executor who is also trustee may, notwithstanding the provisions of the Land Transfer Act, give immediate effect to the testamentary trust disposition by electing to hold the property devised to him as trustee without the necessity of any formal assent or conveyance to himself, and thus render applicable the discretionary power of paying estate duty contained in the sub-section.

As regards the present liability of the personal representative to account as trustee under s. 8 (4) of the Finance Act, it is difficult to avoid the conclusion that a personal representative will now become liable to account as trustee "to the extent of the property actually received or disposed of by him," in respect of all property which by law devolves upon him. It would, nevertheless, appear that the personal representative by assent or conveyance pursuant to s. 3 (1) of the Land Transfer Act, made subject to a charge for all moneys (if any) which he is liable to pay, may shift from himself the burden of this liability to

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account in common with all other liabilities in respect of the land, save such as are mentioned in that section.

Where the assets are insufficient for the payment of debts without resort to real estate, and the personal representative proceeds to a sale thereof, the extent of his liability to account is limited apparently to the surplus proceeds of sale after payment of debts, as such proceeds alone will represent the property which "passes on the death of the deceased."

Power to raise money for payment of duty by sale or mortgage.

Any money which the personal representative may require for the payment of estate duty, which he is either required or authorised to pay as above explained, may be raised by him in manner provided by s. 9 (5), whereby it is enacted as follows :

> "A person authorised or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof."

The sub-section is supplementary to the powers of sale and mortgage for payment of debts usually exercisable by personal representatives (*t*).

SECTION III.

OF SETTLEMENT ESTATE DUTY (*u*).

A further duty of £1 per cent., called Settlement Estate Duty, is imposed by s. 5 of the Finance Act,

(*t*) See *ante*, pp. 170 *et seq.*

(*u*) As to the incidence of this duty, see *post*, p. 386.

1894, upon the principal value of settled property therein referred to. That section enacts as follows:

Settled property.

"(1) Where property in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property,—

"(a) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased; but

"(b) during the continuance of the settlement the settlement estate duty shall not be payable more than once."

It will be seen from the above section that the imposition of settlement estate duty is confined to property in respect of which estate duty is leviable (*y*).

Meaning of "settled property," and "settlement."

The expressions "settled property" and "settlement" in s. 5 are defined by s. 22 as follows:

"(h) The expression "settled property" means property comprised in a settlement:

"(i) The expression "settlement" means any instrument, whether relating to real property or personal property, which is a settlement within the meaning of section 2 of the Settled Land Act, 1882 (*z*), or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust."

Definition of "settlement" in Settled Land Act, 1882.

A "settlement" within the meaning of the Settled Land Act is, or is created by any instrument or instruments (*a*) by which "any land or any estate or interest

(*y*) See, as to property in respect of which estate duty is leviable, *ante*, pp. 230 *et seq.*

(*z*) 45 & 46 Vict. c. 38.

(*a*) See, as to compound settlements contained in more than one instrument, *Re Mundy's Settled Estates*, [1891] 1 Ch. 399 [C. A.]; *Re Byng's*

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in land, stands for the time being limited to or in trust for any persons by way of succession" (*b*). In any case in which property is so settled as to constitute a "settlement" within the meaning of that expression as thus defined, it must, therefore, be treated as "settled property" within the meaning of s. 5 of the Finance Act, and accordingly be liable to settlement estate duty (*c*).

The expression "by way of succession" may be treated as equivalent to "successively upon death" (*d*).

Estate in part settled.

The duty imposed by s. 5 of the Finance Act, above set out, is a duty on that part of the estate which is settled, and not on the whole estate if only part of the estate is settled (*e*).

Property contingently settled.

Property which is only contingently settled is settled property within the meaning of the Finance Act, notwithstanding that it may happen that the settlement will never attach (*f*). So where a testator bequeathed his residuary estate in trust for his wife for life, and after her decease in trust for all his children who, being sons, should attain the age of twenty-one years, or, being daughters, should attain that age or marry under that age, in equal shares, and settled each daughter's share upon herself for life with remainder over; it was held, upon the death of the testator leaving

Settled Estates, [1892] 2 Ch. 219; *Re Mundy and Roper's Contract*, [1899] 1 Ch. 275 [C. A.]; *Re Lord Wimborne and Brown's Contract*, [1904] 1 Ch. 537; *Re Phillimore's Estate*, *Phillimore* v. *Milnes*, [1904] 2 Ch. 460.

(*b*) 45 & 46 Vict. c. 38, s. 2 (1).

(*c*) See *Att.-Gen.* v. *Owen*, [1899] 2 Q. B. 253; *Re Campbell*, [1902] 1 K. B. 113 [C. A.].

(*d*) *Re Campbell*, *supra*, at p. 123.

(*e*) *Att.-Gen.* v. *Fairley*, [1897] 1 Q. B. 698.

(*f*) *Ibid.* See 61 & 62 Vict. c. 10, s. 14, which provides for the repayment of settlement estate duty which has been paid in respect of property settled upon a contingency which has not arisen, and cannot arise. See also *Att.-Gen.* v. *Clarkson*, [1900] 1 Q. B. 156 [C. A.]; *Inland Revenue* v. *Stewart's Trustees* (1899), W. N. 198.

his wife and two sons and a daughter under age and unmarried surviving him, that settlement estate duty was payable upon the whole residuary estate, for that the settlement of the daughter's third share and the contingent settlement of the two sons' third shares (the contingency being the death of either son under twenty-one years of age and the consequent accruer to the daughter's settled share) constituted a settlement, for the purposes of the Finance Act, of the whole residuary estate, and that the exception contained in s. 5 of the Act above set out, was therefore inapplicable (*g*).

Exemptions from settlement estate duty.

The Act further provides for the exemption from settlement estate duty of the following properties, viz.: Property settled by a disposition which has taken effect before August 2nd, 1894 (*h*); and small estates forming estates by themselves under s. 16 (3) of the Act in respect of which "fixed duty" or estate duty has been paid (*i*).

Liability of representative to account for and pay settlement estate duty.

The Act contains no further provisions as to the persons accountable for, and as to the payment of settlement estate duty, than those relating to estate duty generally which have already been considered (*k*); and it has been held that the provision for payment of settlement estate duty is covered by the provision for payment of estate duty (*l*).

SECTION IV.

OF LEGACY DUTY (*m*).

Nature of duty.

Legacy duty is a tax upon the interest of the individual beneficiary, and is graduated according to

(*g*) *Att.-Gen.* v. *Fairley*, *supra*.

(*h*) Section 21 (4).

(*i*) Section 16 (3). See *ante*, pp. 243, 244. (*k*) *Ante*, p. 245 *et seq.*

(*l*) *Re Webber*, *Gribble* v. *Webber*, [1896] 1 Ch. 914, 921; *Re Maryon-Wilson*, *Wilson* v. *Maryon-Wilson*, [1900] 1 Ch. 565 [C.A.].

(*m*) As to the incidence of this duty, see *post*, p. 388.

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the degree of his relationship to the person from whom he derives his interest.

How imposed.

The duty was imposed originally upon the receipt taken by the personal representative from each beneficiary upon distribution, but since the statute 36 Geo. 3, c. 52, has been imposed upon the property itself from time to time made subject to legacy duty. The provisions of the last mentioned statute still mainly regulate the collection and recovery of legacy duty; but as regards the property subject to legacy duty, and the rate at which the duty is to be paid, considerable amendments have, from time to time, been made by various statutes.

Upon what interests imposed.

Generally speaking, legacy duty may be said to be a duty imposed upon legacies as defined by statute, and upon residues and shares of residues whether accruing by virtue of any testamentary disposition or upon a partial or total intestacy.

55 Geo. 3, c. 184.

The statute 55 Geo. 3, c. 184, repealed all then existing duties, and imposed the several duties mentioned in the schedule thereto (*n*). The schedule referred to, so far as at present material, is as follows:

> "Where the testator, testatrix, or intestate shall have died after the 5th day of April 1805:
>
> "For every legacy, specific or pecuniary, or of any other description of the amount or value of £20 or upwards given by any will or testamentary instrument of any person who shall have died after the 5th day of April, 1805, either out of his or her personal or movable estate or out of or charged upon his or her real or heritable estate or out of any moneys to arise by the sale, mortgage, or other disposition of his or her real or heritable estate or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815:

(*n*) Section 2.

	£ s. d.
"Also for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons) of the personal or movable estate of any person who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue or share of residue shall be of the amount or value of £20 or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815:	
"And also for the clear residue (when given to one person) and for every share of the clear residue (when given to two or more persons) of the moneys to arise from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold, mortgaged, or otherwise disposed of by any will or testamentary instrument of any person who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any), where such residue, or share of residue shall amount to £20 or upwards, and where the same shall be paid retained or discharged after the 31st day of August, 1815:	
"*Where any such legacy or residue or any share of such residue shall have been given or have devolved to or for the benefit of a child of the deceased, or any descendant of a child of the deceased, or to or for the benefit of the father or mother, or any lineal ancestor of the deceased, a duty at and after the rate of one pound per centum on the amount or value thereof* (o) - -	*per cent.* 1 0 0
"Where any such legacy or residue or any share of such residue shall have been given or have devolved to or for the benefit of a brother or sister of the deceased, or any descendant of a brother or sister of the deceased, a duty at and after the rate of three pounds per centum on the amount or value thereof - - - -	per cent. 3 0 0
"Where any such legacy or residue or any share of such residue shall have been given or have devolved to or for the benefit of a brother or sister of the father or mother of the deceased,	

(o) See *post*, p. 263.

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	£ s. d.
or any descendant of a brother or sister of the father or mother of the deceased, a duty at and after the rate of five pounds per centum on the amount or value thereof - - - - -	per cent. 5 0 0
"Where any such legacy or residue or any share of such residue shall have been given or have devolved to or for the benefit of a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased, a duty at and after the rate of six pounds per centum on the amount or value thereof - - - - - - - - -	per cent. 6 0 0
"And where any such legacy or residue or any share of such residue shall have been given or have devolved to or for the benefit of any person in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased, a duty at and after the rate of ten pounds per centum on the amount or value thereof - - - - - - - - -	per cent. 10 0 0
"And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule.	
"And where any legatee shall take two or more distinct legacies or benefits under any will or testamentary instrument, which shall together be of the amount or value of £20 each shall be charged with duty, though each or either may be separately under that amount or value.	

"EXEMPTIONS.

"Legacies and residues or shares of residue of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the royal family.

"And all legacies which were exempted from duty by the Act passed in the 39th year of his Majesty's reign, c. 73, for exempting certain specific legacies given to bodies corporate, or other public bodies, from the payment of duty."

The above is principal statute

The above enactment, although amended in the several important particulars below mentioned, remains

the principal enactment dealing with the property upon which legacy duty is payable.

relating to legacy duty.

No exemption on ground of smallness of legacy.

The provisoes to the first three paragraphs limiting the imposition of legacy duty to legacies and residues, or shares of residues, of the respective amounts of £20 or upwards, have been repealed (*p*), and no exemption can now be claimed by a beneficiary on the ground of the smallness of the benefit received by him (*q*).

Meaning of "legacy" as amended by 8 & 9 Vict. c. 76.

The meaning of the word "legacy," as used in the above enactment, has since been extended by s. 4 of the statute 8 & 9 Vict. c. 76, as follows:

> "Every gift by any will or testamentary instrument of any person, which by virtue of any such will or testamentary instrument is or shall be payable or shall have effect or be satisfied out of the personal or moveable estate or effects of such person or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of, or which gift is or shall be payable or shall have effect or be satisfied out of or is or shall be charged or rendered a burden upon the real or heritable estate of such person, or any real or heritable estate, or the rents or profits thereof, which such person hath had or shall have had any right or power to charge, burden, or affect with the payment of money, or out of or upon any moneys to arise by the sale, burden, mortgage, or other disposition of any such real or heritable estate, or any part thereof, whether such gift shall be by way of annuity or in any other form, and also every gift which shall have effect as a donation mortis causâ, shall be deemed a legacy within the true intent and meaning of all the several Acts granting or relating to duties on legacies in Great Britain and Ireland respectively, and shall be subject and liable to the said duties accordingly: Provided always, that no sum of money which by any marriage settlement is or shall be subjected to any limited power of appointment to or for the benefit of any person or

(*p*) 44 & 45 Vict. c. 12, s. 42.

(*q*) See as to exemption from duty of legacies generally on the ground of the smallness of the estate distributable, *post*, p. 263.

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persons therein specially named or described as the object or objects of such power, or to or for the benefit of the issue of any such person or persons, shall be liable to the said duties on legacies under the will in which such sum is or shall be appointed or apportioned in exercise of such limited power."

Legacies charged on real estate exempted.

Legacies charged, or to be satisfied out of real estate, mentioned in both of the enactments above set out, are now made subject to succession duty, and exempted accordingly from the payment of legacy duty (*r*).

Legacies of leaseholds exempted.

Leaseholds are, by the Succession Duty Act, 1853, made subject to succession duty and exempted from legacy duty (*s*).

Legacy defined as a "gift."

It will be observed that in the definition of a legacy contained in the enactment of 8 & 9 Vict. c. 76, above set out, the word "gift" is used throughout, and that express exception is made of the case of property appointed by will under a limited power of appointment created by settlement; property so appointed being considered rather as the gift of the settlor than of the testator executing the power.

Legacy upon condition is a "gift" and liable to legacy duty.

The question has frequently arisen under this enactment (and under the earlier enactment 45 Geo. 3, c. 28, for which the present was substituted, but in which the same expression was employed) as to what form of disposition will amount to a "gift" by the testator so as to be liable to legacy duty. It appears to be settled that a legacy, though given on condition, as that the legatee should take the arms and name of the testator, or that he should convey an estate of his to a third party, or, if the legatee were the testator's widow, that she should maintain the testator's children, would be a gift liable to legacy duty (*t*).

(*r*) 51 & 52 Vict. c. 8, s. 21 (2).

(*s*) 16 & 17 Vict. c. 51, s. 19. See *post*, p. 266.

(*t*) *Sweeting* v. *Sweeting*, 1 Drew. 331 (decided under the statute 45 Geo. 3, c. 28).

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Forgiveness of debt and direction to pay debt.

So, the forgiveness of a debt by will is a legacy, and liable to duty (*u*). So, also, a direction contained in a will for the payment of debts with the payment of which the testator was not concerned, constitutes a gift in respect of which legacy duty is payable (*x*). Accordingly, moneys directed to be paid in liquidation in full of all the creditors who had proved in the bankruptcy of the testator, were held liable to legacy duty (*y*). But a direction by a testator that his creditors shall be paid, although comprising the names of creditors whose debts have, by lapse of time, become irrecoverable, is not a gift upon which legacy duty is payable (*z*).

Profit costs.

Profit costs directed to be charged by an executor for professional services rendered to the estate, are a matter of bounty, and liable to legacy duty (*a*).

Execution by will of powers of appointment.

The execution, by will, of a general power of appointment is regarded as a gift by the donee of the power, and subject to legacy duty (*b*), but not so the execution of a special power (*c*). It is expressly provided in the enactment above set out that the execution, by will, of a special power of appointment created by deed is not a gift upon which legacy duty is payable.

Creation of powers of appointment.

Conversely, a general power of appointment contained in a will is not a gift upon which legacy duty is payable; but a bequest to such of several named persons as A. shall appoint, whether the appointment

(*u*) *Izon* v. *Butler*, 2 Price, 34; *Att.-Gen.* v. *Holbrook*, 3 Y. & J. 114.

(*x*) *Foster* v. *Ley*, 2 Bing. N. C. 269.

(*y*) *Turner* v. *Martin*, 7 De G. M. & G. 429.

(*z*) *Williamson* v. *Naylor*, 3 Y. & C. 208.

(*a*) *Re White, Pennell* v. *Franklin*, [1898] 1 Ch. 297. See *Re Thorley, Thorley* v. *Massam*, [1891] 2 Ch. 613 [C. A.].

(*b*) *Re Cholmondeley*, 1 C. & M. 149; *Platt* v. *Routh*, 3 Beav. 257, 280; affirmed in *Drake* v. *Att.-Gen.*, 10 Cl. & F. 257. See *Commissioners of Stamp Duties* v. *Stephen*, [1904] A. C. 137, 140.

(*c*) See *Att.-Gen.* v. *Chapman*, [1891] 2 Q. B. 526; *Att.-Gen.* v. *Gosling*, [1892] 1 Q. B. 545, 548.

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is to be executed by deed or will, is a gift liable to legacy duty under the will of the creator of the power (*d*).

Donee of power having also limited interest.

In the case of a power created by will, if the donee of the power is also the donee of any limited interest in the property, the property appointed is, by virtue of s. 18 of the statute 36 Geo. 3, c. 52, rendered chargeable, upon the exercise of the power, with duty as a legacy to the donee of the power under the original will, in addition to the duty with which it becomes chargeable as a legacy to his appointees under his own will (*e*).

Donations *mortis causâ*.

Donations *mortis causâ*, though not mentioned as liable to legacy duty in the enactment above set out of the statute 55 Geo. 3, c. 184, are included in the definition of a legacy contained in the statute 8 & 9 Vict. c. 76, and are, therefore, to be treated as subject to the duties imposed by the former statute.

Title to, how derived.

A *donatio mortis causâ* is not strictly a legacy, and, forming no part of the estate of the personal representative, "does not regularly fall within an administration, nor require any act by the executor to constitute a title in the donee" (*f*).

Description of *donatio mortis causâ*.

In *Hedges* v. *Hedges* (*g*), COWPER, L.C., describes a *donatio mortis causâ* as follows: "Where a man lies in extremity, or being surprised with sickness, and not having an opportunity of making his will, but lest he shall die before he can make it, he gives with his own hands his goods to his friends about him; this, if he dies, shall operate as a legacy, but if he recovers, then does the property thereof revert to him."

(*d*) *Att.-Gen.* v. *Pickard*, 3 M. & W. 552; *Sweeting* v. *Sweeting*, 1 Drew. 331.

(*e*) Hanson's Death Duties (5th ed.), by Dibdin and Errington, p. 403. See *Att.-Gen.* v. *Mitchell*, 6 Q. B. D. 548.

(*f*) *Tate* v. *Hilbert*, 2 Ves. jun. 111, 120.

(*g*) Pr. Ch. 269; Gilb. Eq. Rep. 12, 13.

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Essentials to valid gift *mortis causâ*.

In order that a gift may take effect as a *donatio mortis causâ*, it must be made by the donor in contemplation of a fatal termination to the illness from which he is suffering (*h*). The gift must not, of course, be illusory; there must be an actual parting with the possession of, and dominion over, the thing given (*i*). Where the subject-matter of the gift does not admit of corporeal delivery, it is sufficient if the donor do all in his power to transfer the possession, as by delivering bills of sale, the key of a warehouse or of a trunk (*k*).

A "present absolute gift" will not be a good *donatio mortis causâ* (*l*), but a gift made *in extremis* will be presumed to have been made to take effect in the event only of the death of the donor (*m*), unless there is evidence to the contrary (*n*).

Subject-matter of gift *mortis causâ*.

In addition to personal chattels, the following have been held to be transferable by way of *donatio mortis causâ:* Bank notes (*o*); bankers' deposit notes (*p*); a policy of assurance (*q*); a promissory note payable to the deceased's order, but not indorsed (*r*); bills of exchange in favour of the deceased or his order (*s*); bills of exchange payable to order, and which had not

(*h*) *Edwards* v. *Jones*, 1 My. & C. 226; *Tate* v. *Hilbert*, *supra; Gardner* v. *Parker*, 3 Madd. 184; *Miller* v. *Miller*, 3 P. Wms. 356.

(*i*) *Drury* v. *Smith*, 1 P. Wms. 404; *Lawson* v. *Lawson*, 1 P. Wms. 441; *Ward* v. *Turner*, 2 Ves. 431; *Reddel* v. *Dobree*, 10 Sim. 244; *Solicitor to the Treasury* v. *Lewis*, [1900] 2 Ch. 812. See *Re Johnson*, *Sandy* v. *Reilly*, 92 L. T. 357.

(*k*) *Snelgrove* v. *Bailey*, 3 Atk. 214, 215; *Jones* v. *Selby*, Pr. Ch. 300; *Ward* v. *Turner*, *supra*.

(*l*) *Tate* v. *Hilbert*, *supra; Walter* v. *Hodge*, 2 Swans. 92.

(*m*) *Gardner* v. *Parker*, *supra*.

(*n*) *Walter* v. *Hodge*, *supra; Edwards* v. *Jones*, *supra*.

(*o*) *Shanley* v. *Harvey*, 2 Ed. Rep. 125; *Ashton* v. *Dawson*, Sel. Ch. Ca. 14; *Miller* v. *Miller*, 3 P. Wms. 356.

(*p*) *Amis* v. *Witt*, 33 Beav. 619; *Re Mead*, *Austin* v. *Mead*, 15 Ch. D. 651; *Re Dillon*, *Duffin* v. *Duffin*, 44 Ch. D. 76 [C. A.].

(*q*) *Amis* v. *Witt*, *supra*.

(*r*) *Veal* v. *Veal*, 27 Beav. 303.

(*s*) *Rankin* v. *Weguelin*, 27 Beav. 309.

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been indorsed (*t*); a cheque payable to the donor's order, and not indorsed (*u*). The delivery of a Post Office Savings Bank deposit book may also, it has been held, constitute a good *donatio mortis causâ* of the balance standing to the credit of the depositor (*x*); but neither the delivery of certificates of railway stock (*y*) nor of building society share certificates (*z*) can constitute a *donatio mortis causâ* of the stock or shares.

The delivery by the deceased of his own cheque is ineffectual as a gift *mortis causâ*, for if the cheque is not presented in the donor's lifetime it will be revoked by his death. If it is presented and paid before the donor's death, there can be no question of *donatio mortis causâ* of the cheque, although there may be a question whether the money has been received on the terms that it shall only be retained in case of the donor's death (*a*).

Exemption of legacy to husband or wife of deceased.

With regard to the first of the exemptions from legacy duty contained in the above enactment of the statute 55 Geo. 3, c. 184, it has been held that the property must pass to the husband or wife for his or her absolute benefit. So, a legacy to a wife "for the maintenance of herself and our children," or by other words importing a trust in favour of children, was not exempted from legacy duty (*b*).

Exemption of books, etc. to certain institutions.

The second exemption is in favour of—

> "Books, prints, pictures, statues, gems, coins, medals, specimens of natural history, or other specific articles, which shall be given or bequeathed to or in

(*t*) *Re Mead, Austin* v. *Mead, supra.*

(*u*) *Clement* v. *Cheesman*, 27 Ch. D. 631.

(*x*) *Re Weston, Bartholomew* v. *Menzies*, [1902] 1 Ch. 680; *Re Andrews, Andrews* v. *Andrews*, [1902] 2 Ch. 394. See *M'Connell* v. *Murray*, Ir. R. 3 Eq. 460.

(*y*) *Moore* v. *Moore*, L. R. 18 Eq. 474.

(*z*) *Re Weston, Bartholomew* v. *Menzies, supra.*

(*a*) *Re Beaumont, Beaumont* v. *Ewbank*, [1902] 1 Ch. 889.

(*b*) *Re Harris*, 7 Exch. 344. See now 57 & 58 Vict. c. 30, s. 1, abolishing one per cent. legacy duty, *infra.*

trust for any body corporate, whether aggregate or sole, or to the Society of Serjeants' Inn, or any of the Inns of Court or Chancery, or any endowed school, in order to be kept and preserved by such body corporate, society or school, and not for the purposes of sale."

Exemption of "estate by itself."

In addition to these exemptions, and to the exemptions already referred to (*c*) in favour of leaseholds and of money charged upon land, in respect of which succession duty is now payable in lieu of legacy duty, the latter duty has ceased to be payable where "fixed duty" or estate duty has been paid in respect of an "estate by itself" within the meaning of s. 16 (3) of the Finance Act, 1894 (*d*).

Exemption where 1 per cent. estate duty has been paid.

Lastly, legacy duty at the rate of one pound per cent. payable under the will or intestacy of the deceased, or under his disposition, or any devolution from him under which respectively estate duty has been paid, or under any other disposition under which estate duty has beeen paid, is no longer leviable. (*e*).

Liability of representative to account for and pay legacy duty.

As has been already observed, the collection and recovery of legacy duty is still regulated by the provisions of the statute 36 Geo. 3, c. 52. By that statute it is provided that except as therein mentioned legacy duty shall be "accounted for, answered, and paid" by the personal representative of the deceased person (*f*). No legacy or share of residue is to be paid by the personal representative without taking a receipt in writing for the same, stating the date, the name of the deceased, the name of the personal representative, the name of the beneficiary, the amount paid, and the rate and amount of duty payable thereon (*g*). Payment by the personal representative to the beneficiary without any such receipt being taken therefor, will subject both

(*c*) *Ante*, p. 258.
(*d*) *Ante*, pp. 243, 244.
(*e*) 57 & 58 Vict. c. 30, s. 1, First Schedule.
(*f*) See s. 6.
(*g*) Section 27.

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parties to a penalty of £10 per cent. on the amount for which the receipt should have been taken (*h*).

Legacy duty for which representative not accountable.

The personal representative is not accountable for the legacy duty upon annuities made payable out of other legacies (*i*); upon legacies to different persons in succession standing in different degrees of consanguinity and handed over by them to the trustees of the will (*l*); or upon legacies of articles of plate, furniture, or other things not yielding income, given to, or for the benefit of, different persons in succession (*m*).

SECTION V.

OF SUCCESSION DUTY (*n*).

Nature of duty.

Succession duty in common with legacy duty is a tax upon the interest of the individual beneficiary, and is graduated according to the degree of his relationship to the person from whom the succession is derived. Until recently, succession duty differed materially in its incidence from legacy duty, in that it was a tax chargeable only upon the value of the life interest of the successor, notwithstanding that the succession was to an absolute interest; and, that it was payable by instalments free of interest, instead of being payable, as is legacy duty, in a lump sum. Since the passing of the Finance Act, 1894 (*o*), the two duties have been placed on an equal footing in these respects.

For the most part, as will be seen, the personal representative is not concerned with the payment of succession duty. It is not thought necessary, therefore,

(*h*) Section 28.
(*i*) Section 9.
(*l*) Section 13.
(*m*) Section 14. See *Att.-Gen.* v. *Bruce*, [1901] 2 K. B. 391.
(*n*) As to the incidence of this duty, see *post*, p. 389.
(*o*) 57 & 58 Vict. c. 30.

to give more than a brief outline of the subject in the present treatise.

Upon what interests imposed.

Succession duty is a tax imposed upon every "succession" to "property," and is regulated by the Succession Duty Act, 1853 (*p*), as amended by the Finance Acts, 1894 (*q*) and 1896 (*r*).

Meaning of "succession."

A "succession" for the purpose of succession duty is defined by s. 2 of the Succession Duty Act, 1853, which enacts as follows:

> "Every past or future disposition (*s*) of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person (*t*) dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

Meaning of "property."

The expression "property" is defined as including both real and personal property (*u*); but the application of the Act to personal property is considerably limited by the concluding clause of s. 18, which provides that "no person charged with the duties on legacies and

(*p*) 16 & 17 Vict. c. 51. See an exhaustive explanation of the Act, *per* Lord MACNAGHTEN, in *Duke of Northumberland* v. *Att.-Gen.*, [1905] A. C. 406.

(*q*) 57 & 58 Vict. c. 30. (*r*) 59 & 60 Vict. c. 28.

(*s*) *Duke of Northumberland* v. *Att.-Gen.*, *supra*.

(*t*) See *Att.-Gen.* v. *Earl of Selborne*, [1902] 1 K. B. 388, 399 [C. A.].

(*u*) Section 1.

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shares of personal estate under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property" (*x*).

Leaseholds.

Leaseholds are included in the definition of real property, and excluded from that of personal property contained in the Act (*y*).

Date of instrument conferring succession immaterial.

Although succession duty is payable only in respect of a succession occurring since the day upon which the Act came into operation, May 19th, 1853, it is, as a general rule, payable without regard to the date of the instrument under the provisions of which the succession takes effect.

What will be "deemed to confer a succession."

It is further provided by the Act that the accruer of any beneficial interest to joint tenants taking by survivorship (*z*), the exercise of powers of appointment under dispositions taking effect upon death after the commencement of the Act (*a*), the extinction of determinable charges (*b*), and dispositions accompanied by the reservation of a benefit to the grantor (*c*), shall be deemed to confer successions.

Effect of Land Transfer Act, 1897, upon payment of succession duty.

The provisions of the Land Transfer Act, 1897 (*d*), do not appear to have affected the question of succession duty upon real estate, except so far as they postpone the time of payment. The personal representative, under that Act, does not become "beneficially entitled" to the realty of the deceased owner within the meaning of the section, above set out, defining a succession. The devolution, therefore, of real estate by operation

(*x*) See *Earl Howe* v. *Earl of Lichfield*, L. R. 2 Ch. App. 155; *Att.-Gen.* v. *Mitchell*, 6 Q. B. D. 548.

(*y*) Section 1.

(*z*) Section 3.

(*a*) Section 4.

(*b*) Section 5.

(*c*) Section 7. See *Att.-Gen.* v. *Johnson*, [1903] 1 K. B. 617 [C. A.].

(*d*) 60 & 61 Vict. c. 65.

of law upon the personal representative no more creates a succession than does the devolution upon him of leasehold property.

A "succession" in respect of real estate will still be conferred, at the death of the owner, upon his heir or devisee; but succession duty will not become payable under s. 20 of the Succession Duty Act until the heir or devisee, or some person on his behalf, becomes entitled in possession to the property.

Persons accountable for succession duty.

Section 44 of the Succession Duty Act defines the persons accountable for succession duty. So far as material for the present purposes, that section enacts as follows:

> "The following persons, besides the successor, shall be personably accountable to her Majesty for the duty payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them respectively after the time appointed for the commencement of this Act; that is to say, every trustee, guardian, committee, tutor, or curator, or husband, in whom respectively any property, or the management of any property, subject to such duty, shall be vested, and every person in whom the same shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession . . ." (*e*).

Representative, how far accountable.

The expression "trustee" is defined by the Act as ncluding an executor or administrator (*f*); nevertheless, the personal representative does not become accountable as such under the section above set out, for the succession duty payable upon any succession conferred at the death of the person whose estate he is administering. His duty is to hand over the property in due course of administration, to the persons beneficially entitled, or their trustees, who then become accountable for succession duty. Until the property is so handed over,

(*e*) See *Duke of Northumberland* v. *Att.-Gen.*, [1905] A. C. 406, 412.
(*f*) Section 1.

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unless, of course, the personal representative retains possession as trustee under the will, no succession duty is payable (*g*).

Representative an accountant to the Crown for any succession duty payable out of estate.

The personal representative must, however, provide, as for a debt to the Crown, for the payment of any succession duty payable out of the estate of his testator or intestate in respect of any succession conferred at the death of a third person. In respect of duty so payable, the personal representative is, by the concluding clause of the 44th section, made an accountant to the Crown.

Exemptions from succession duty.

It has already been observed that, in respect of property chargeable with estate duty under the Finance Act, 1894 (*h*), there will not be leviable either one per cent. succession duty, or the additional succession duties imposed by s. 21 of the Customs and Inland Revenue Act, 1888 (*i*).

(*g*) Section 20. See *Re Higgins, Day* v. *Turnell*, 31 Ch. D. 142 [C. A.].

(*h*) 57 & 58 Vict. c. 30, s. 1; First Schedule.

(*i*) 51 & 52 Vict. c. 8.

CHAPTER XI.

OF THE ADMINISTRATION BY THE COURT OF INSOLVENT ESTATES.

SECTION I.

Of the Changes introduced by Section 10 of the Judicature Act, 1875.

Solvent and insolvent estates.

Prior to the Judicature Act, 1875 (*a*), the administration by the Court of the estate of a deceased person in payment of his debts, was carried out on precisely the same lines, whether the estate were solvent or insolvent. The result was that if a man died the day after being adjudicated a bankrupt, his assets would be administered according to the rules of bankruptcy; but if he died the day before the day on which, if he had lived, he would have been adjudicated bankrupt, his assets would be administered in the ordinary way in which the assets of a solvent person are now administered in the Chancery Division (*b*). To remedy this somewhat absurd result of the then existing law, was the object of s. 10 of the Judicature Act, 1875.

By that section (which replaced s. 25 of the Judicature Act, 1873 (*c*), before the latter section came into operation) it is enacted (omitting those words that have reference only to the winding-up of companies) as follows:

Amendment of 36 & 37 Vict. c. 66, s. 25, as to

"In the administration by the Court of the assets of any person who may die after the commencement of

(*a*) 38 & 39 Vict. c. 77.

(*b*) See *per* Jessel, M.R., in *Re Hopkins, Williams* v. *Hopkins*, 18 Ch. D. 370, 377 [C. A.].

(*c*) 36 & 37 Vict. c. 66.

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rules of law upon certain points.

> this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities, and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person . . . may come in under the decree or order for the administration of such estate . . . and make such claims against the same as they may respectively be entitled to by virtue of this Act."

"May prove insufficient."

The words of the Act "*may* prove insufficient for the payment in full of his debts and liabilities," at first gave rise to a considerable degree of uncertainty as to whether, in any particular case, the ordinary rules of administration or the rules in bankruptcy should be applied (*d*).

It was, however, explained by Sir G. JESSEL in *Re Hopkins* (*e*) that "may prove insufficient" cannot mean "shall be proved to be insufficient," for the insufficiency cannot be fully established till afterwards. The words must mean only that there is sufficient reason to believe that the estate will turn out insolvent. In the case of a winding-up of a company, to which this section in like manner applies, where the assets "may prove to be insufficient," Lord SELBORNE observed (*f*) that the section must be treated as applicable until it is shown that the assets are sufficient for the payment of the debts in full. The result appears to be that the section will be applied where there is reason to believe that the estate is insolvent, until the contrary is proved to be the case.

(*d*) Eddis on Administration of Assets, p. 112.
(*e*) 18 Ch. D. 370, 377.
(*f*) *Re Milan Tramways Co.*, 25 Ch. D. 587 [C. A.].

It has been held that the section applies to the estate of a deceased person which, though sufficient for payment in full of his debts and liabilities, apart from the cost of administration, becomes insufficient by reason of those costs (*g*).

Surplus assets.

Where the estate is insufficient for the payment in full of the debts and liabilities owing at the date of the judgment and is so found by the master's certificate, but afterwards becomes sufficient, by reason of a rise in the market value of the assets, to pay the principal of all the debts and the interest on those debts which by law carry interest, though insufficient to pay the interest which it is the practice of the Court to allow on those debts which do not by law carry interest, it has been held that the distribution of the surplus assets, after payment of the principal amounts certified to be due, is governed by the general rule of the Court as to the administration of estates in the Chancery Division (*h*) and not by s. 10 of the Judicature Act, and accordingly, that such surplus assets are applicable in payment first of interest on debts which at law carry interest at the rate contracted for, and then in payment, so far as it will go, of interest at four per cent. on all other debts (*i*). On the other hand, where, under similar circumstances, the surplus assets were insufficient for payment in full, either of the interest on debts by law carrying interest or of the interest on debts not by law carrying interest, it was held by FARWELL, J. (*k*), dissenting from the principle applied in the case last referred to, that s. 10 of the Judicature Act applied, and that the surplus assets must be applied in the payment of interest according to the rules in bankruptcy which give interest on all proved debts equally.

(*g*) *Re Leng, Tarn* v. *Emmerson*, [1895] 1 Ch. 652.
(*h*) R. S. C., Ord. LV., rr. 62, 63.
(*i*) *Re Henley, Alcock* v. *Henley*, 75 L. T. R. 307.
(*k*) *Re Whitaker, Whitaker* v. *Palmer*, [1904] 1 Ch. 299.

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The section does not, of course, apply to the administration by the personal representative of insolvent estates out of Court. (*l*).

Rules of bankruptcy, how far incorporated.

Considerable difference of opinion, in like manner, arose as to the extent to which the section operated towards importing the rules of bankruptcy into the administration by the Court of insolvent estates. Recent decisions, however, have thrown considerable light on the question, and it is now possible to state with some degree of confidence, the rules by which the Court will now be guided in the administration of the insolvent estates of deceased persons.

In the first place, then, the section does not in any way affect the question as to what are the assets to be administered. "The goods which were the goods of the dead man at the time of his death, are his goods for the purpose of administration, and they only are to be administered" (*m*).

None of the rules of bankruptcy have therefore been imported into the administration by the Court of the insolvent cases of deceased persons, which, if adopted, would go to swell the assets. The assets are to be ascertained by applying the general laws of property, and not the special rules applicable only to cases of bankruptcy (*n*).

Thus it has been decided that s. 87 of the Bankruptcy Act, 1869 (*o*), s. 45 of the Bankruptcy Act, 1883 (*p*) and s. 11 of the Bankruptcy Act, 1890 (*q*), restricting

(*l*) *Re Hargreaves, Dicks* v. *Hare*, 44 Ch. D. 236 [C. A.]. See *ante*, p. 221.

(*m*) *Re Maggi, Winehouse* v. *Winehouse*, 20 Ch. D. 545, 550.

(*n*) *Re Leng, Tarn* v. *Emmerson, supra; Re Whitaker, Whitaker* v. *Palmer*, [1901] 1 Ch. 9, 13 [C. A.].

(*o*) 32 & 33 Vict. c. 71. See *Re Richards & Co.*, 11 Ch. D. 676; *Re Withernsea Brickworks*, 16 Ch. D. 337 [C. A.].

(*p*) 46 & 47 Vict. c. 52. See *Pratt* v. *Inman*, 43 Ch. D. 175.

(*q*) 53 & 54 Vict. c. 71. See *Watkins* v. *Barnard*, 66 L. J. Q. B. 771.

the rights of creditors under execution or attachment; s. 47 of the same Act (*r*), avoiding certain voluntary settlements executed by the bankrupt; the reputed ownership clause (*s*); the provisions as to fraudulent preference (*t*), and the provisions of the Bills of Sale Act as to unregistered bills of sale (*u*), do not apply to the administration by the Court of the insolvent estates of deceased persons.

The section has, however, effected an alteration in the rules formerly adopted by the Court in the administration of the insolvent estates of deceased persons in respect of the following matters, viz.: as to the debts and liabilities which may be proved; as to the mode of valuing certain contingent liabilities and annuities; as to the order of priority in which creditors are to be paid; and as to the proof rights of secured creditors.

SECTION II.

AS TO DEBTS AND LIABILITIES PROVABLE AND THE VALUATION OF CONTINGENT LIABILITIES.

"Debts and liabilities provable."

The words "as to debts and liabilities provable" in s. 10 of the Judicature Act, 1875, have been construed to mean "as to what debts and liabilities may be proved"; and it has been said that the object and scope of this part of the section is to allow everything which would be capable of being proved in a bankruptcy to be proved in the administration by the Court of the estate of a deceased person (*x*).

(*r*) *Ex parte Official Receiver, Re Gould*, 19 Q. B. D. 92 [C. A.].

(*s*) *Gorringe* v. *Irwell India-rubber Works*, 34 Ch. D. 128.

(*t*) See *Re Maggi, Winehouse* v. *Winehouse*, 20 Ch. D. 545, 550.

(*u*) *Re Knott*, 7 Ch. D. 549 n; *Re Count D'Epineuil, Tadman* v. *D'Epineuil*, 20 Ch. D. 217.

(*x*) *Re West of England Bank*, 12 Ch. D. 823.

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The debts, therefore, which are now provable in the administration by the Court of the insolvent estate of a deceased person, and the procedure to be adopted in order to determine the value of contingent liabilities must be ascertained by reference to s. 37 of the Bankruptcy Act, 1883 (*y*), which enacts as follows:

Description of debts provable in bankruptcy.

"(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy.

"(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

"(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.

"(4) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.

"(5) Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the Court.

"(6) If, in the opinion of the Court, the value of the debt or liability is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy.

"(7) If, in the opinion of the Court, the value of the debt or liability is capable of being fairly estimated, the Court may direct the value to be assessed, before the Court itself without the intervention of a jury, and may give all necessary directions for this purpose, and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy.

"(8) 'Liability' shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money

(*y*) 46 & 47 Vict. c. 52.

or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion."

Effect of section.

It will be seen that the section, after specifying two exceptions, proceeds to render almost every conceivable claim provable in bankruptcy and therefore provable in the administration by the Court of the insolvent estate of a deceased person.

Damages for tort.

The first exception excludes any claim for damages founded upon tort. But where, in an action founded upon tort, judgment has been signed before the death, it would seem that the amount for which judgment is recovered is a provable debt (*z*).

A claim made in respect of an infringement of a patent is to be treated as a claim for money had and received, the remedy for which is not in the nature of damages, and is not, therefore, excluded from proof (*a*).

Creditor with notice of act of bankruptcy.

As to the second exception, it must suffice here to refer to s. 4 of the Bankruptcy Act, 1883, and s. 1 of the Bankruptcy Act, 1890, where an enumeration of the acts of bankruptcy will be found.

"Liability."

The definition of "liability" contained in sub-s. (8) above set out is identical with that contained in s. 31 of the Bankruptcy Act, 1869 (*b*), and it is chiefly from

(*z*) *Re Newman*, 3 Ch. D. 494.
(*a*) *Watson* v. *Holliday*, 20 Ch. D. 780.
(*b*) 32 & 33 Vict. c. 71.

decisions under the latter Act that s. 37 of the present Act is to be interpreted.

The question of the construction of s. 31 of the Act of 1869, was fully discussed by the House of Lords in the case of *Hardy* v. *Fothergill* (*c*). In that case it was held that a covenant by the assignee of a lease to indemnify the assignor against the non-performance of a covenant in the lease to repair and yield up the demised premises in repair at the end of the term, amounted to "an obligation or possibility of an obligation to pay money or money's worth" on the breach of the covenant, and was "an engagement to pay, or capable of resulting in the payment of, money or money's worth"; and that a claim based upon the possible future breach of such a covenant constitutes a debt provable in bankruptcy within the meaning of the section, since it was not a claim in its nature "incapable of being fairly valued." From the above decision it is to be gathered that every liability or claim coming within the terms of the general definition of the word "liability," must be treated as provable in the administration by the Court of the insolvent estate of a deceased person unless and until, on consideration of the nature and circumstances of the particular case, the Court makes an order under sub-s. (6) that the liability is "incapable of being fairly valued."

The contingent liability of a co-surety with the deceased to contribution (*d*), and of a surety to pay the debt of the deceased, are liabilities provable within the above section (*e*).

(*c*) 13 App. Cas. 351. See also *Re Midland Coal, Coke, and Iron Co.*, [1895] 1 Ch. 267, 275 [C. A.]; *Re McMahon, Fuller* v. *McMahon*, [1900] 1 Ch. 173.

(*d*) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514.

(*e*) *Re Paine, Ex parte Read*, [1897] 1 Q. B. 122. As to the position of a surety for the payment of interest on a principal sum, for which proof is subsequently made in the bankruptcy of the debtor, see *Re Moss, Ex parte Hallett*, [1905] 2 K. B. 307, and *cf. Re FitzGeorge, Ex parte Robson*, [1905] 1 K. B. 462.

So also annuities *dum casta* (*f*), or for life or widowhood (*g*), have been held to be provable debts.

Claim of lessor for future rents.

Where the estate being administered by the Court comprises leaseholds of an onerous nature and therefore unsaleable, the position of a lessor claiming in respect of future rents will depend upon the course which the Court in its discretion sees fit to take.

Where order for transfer is made.

Should the Court make an order for the transfer of the proceedings into bankruptcy under s. 125 (4) of the Bankruptcy Act, 1883 (*h*), as amended by the Bankruptcy Act, 1890 (*i*), the estate of the deceased will thenceforth vest in the official receiver of the Court, and all the provisions of s. 55 of the Act of 1883 as to disclaimer will apply (*k*). In such case the lessor's right of proof will be the same as in bankruptcy, viz., "on the contract or for breach until disclaimer, and for damages for injury by operation of the disclaimer after that date" (*l*).

Where no order for transfer is made.

If no such order is made, the rules of bankruptcy as to disclaimer will not apply, but the Court will assist the lessor, should he be willing to treat the lease as determined, to prove for his loss on that footing (*m*). The lessor is entitled, if he choose, to enter a claim for the whole future rent reserved, though not in respect of future breaches of covenant; if, however, he do so, he will not, of course, be entitled to possession also (*n*), and the lease will so become a saleable asset.

(*f*) *Ex parte Neal, Re Batey*, 14 Ch. D. 579 [C. A.].

(*g*) *Ex parte Blakemore*, 5 Ch. D. 372 [C. A.].

(*h*) 46 & 47 Vict. c. 52. (*i*) 53 & 54 Vict. c. 71, s. 21 (2).

(*k*) 46 & 47 Vict. c. 52, s. 125 (5); *Re Mellison, Ex parte Day*, [1906] 2 K. B. 68.

(*l*) See Williams' Bankruptcy Practice (8th ed.), p. 273.

(*m*) *Re Panther Lead Co.*, [1896] 1 Ch. 978.

(*n*) *Re New Oriental Bank Corporation* (No. 2), [1895] 1 Ch. 753.

SECTION III.

AS TO THE ORDER OF PRIORITY IN WHICH CREDITORS ARE TO BE PAID.

Bankruptcy rule of *pari passu* payment imported into administration by the Court.

Upon the authority of *In re Maggi* (*o*), decided by FRY, J., in 1882, it was for some time assumed that s. 10 of the Judicature Act, 1875, did not import the general rule in bankruptcy that all debts shall be paid *pari passu* (*p*) into the administration by the Court of insolvent estates. That the contrary is the case, however, is now settled; a wider view as to the meaning of the section having been taken by the Court of Appeal in the recent cases of *Re Leng, Tarn* v. *Emmerson* (*q*), and *Re Whitaker, Whitaker* v. *Palmer* (*r*). In the former case LINDLEY, L.J., commenting upon the earlier decision, expressed himself as follows: "No doubt if that section (*s*) were held applicable in all cases it would exclude the right of an executor to retain his own debt and would deprive judgment creditors of their priority. But these persons are entitled to preference on grounds peculiar to themselves, and the rules which favour them are rather exceptions to the ordinary rules as to payment of debts than illustrations of those rules. Whilst I recognise the exceptions, I cannot myself go so far as to say that the general rule in bankruptcy which requires debts (with some exceptions) to be paid *pari passu* is not applicable in administration actions where the estate being administered is insolvent."

In the latter case, ROMER, L.J., expounds the meaning of the section in still more decisive language: "I think," said the LORD JUSTICE in that case, "that

(*o*) 20 Ch. D. 545.
(*p*) 32 & 33 Vict. c. 71, s. 32; 46 & 47 Vict. c. 52, s. 40.
(*q*) [1895] 1 Ch. 652, 656 [C. A.].
(*r*) [1901] 1 Ch. 9.
(*s*) Section 32 of the Bankruptcy Act, 1869.

the important words in s. 10, for the purposes of this appeal, are those which provide that the bankruptcy rules 'as to the debts and liabilities provable' shall prevail in the administration of an insolvent estate by the High Court. The section does not say that only the rules as to what debts and liabilities shall be provable are to prevail; it speaks of all rules 'as to debts and liabilities provable.' It appears to me that, if there be a rule in bankruptcy that a debt shall be provable, but only in an inferior position to ordinary debts, that would be a rule 'as to' that provable debt within the meaning of the section; and so, if there be a rule in bankruptcy that certain debts shall be provable, but in a superior position. And equally, to my mind, if the rule in bankruptcy be that certain debts and liabilities are provable in no superior or inferior position to ordinary debts, but *pari passu* with them, that would be a rule 'as to' those debts."

In both of the above cases great weight was given to words to which FRY, J., in *Re Maggi* (*ss*) did not refer—namely, "as to debts and liabilities provable"; and the interpretation given to these words was that whatever general rules are in force in the Court of Bankruptcy for the time being with regard to debts and liabilities provable shall apply in the administration of insolvent estates in the Chancery Division.

Effect of Judicature Act, s. 10, upon rules of law.

As regards the effect of these decisions upon the present application of rules of law formerly recognised by the Court of Chancery in the administration of the estates of deceased persons, it would appear that LINDLEY, L.J., considered the decision in *Re Leng* (*t*) reconcilable with that in *Smith* v. *Morgan* (*u*), that a creditor who has recovered judgment against the personal representative is entitled to priority, according

(*ss*) *Supra.*
(*t*) [1895] 1 Ch. 652.
(*u*) 5 C. P. D. 337.

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to the date of his judgment, against other creditors of the same class; but this does not appear to have been the opinion of the other members of the Court, and clearly was not the view taken by the Court of Appeal in *Re Whitaker* (*x*). And in a recent case in Ireland (*y*) it was held, after a careful review of all the authorities, that a creditor who had thus recovered judgment was entitled to no priority in the adminstration by the Court of an insolvent estate.

The exercise of the right of retainer does not involve the necessity of any proof by the personal representative, and is not affected by the Judicature Act, nor by the conjoint operation of that Act and of s. 3 of the Married Women's Property Act, 1882 (*z*). A married woman, therefore, who advances money to her husband for the purposes of his business is entitled, on becoming executrix, to retain the amount advanced out of assets in her hands, notwithstanding an order for the administration of her husband's estate (*a*), although, if she be not executrix, her claim for the amount advanced must, under an order for administration, be postponed to the claims of other creditors (*b*).

Effect of Judicature Act, s. 10, upon rules of equity.

The old rule of the Court of Chancery, that creditors for valuable consideration took precedence in the administration of estates by the Court over those whose debts were not founded upon a valuable consideration, no longer prevails against the general rule in bankruptcy that all debts are to be paid *pari passu* (*c*).

By s. 150 of the Bankruptcy Act, 1883 (*d*), it is provided that the provisions of that Act relating to the

(*x*) [1901] 1 Ch. 9. See *per* COZENS-HARDY, J., in *Re Whitaker*, *Whitaker* v. *Palmer*, [1900] 2 Ch. 676, at p. 681.

(*y*) *Re Whitaker*, *M'Causland* v. *O'Callaghan*, [1904] 1 I. R. 376.

(*z*) 45 & 46 Vict. c. 75.

(*a*) *Re Ambler*, *Woodhead* v. *Ambler*, [1905] 1 Ch. 697 [C. A.].

(*b*) *Re Leng*, *supra*.

(*c*) *Re Whitaker*, [1901] 1 Ch. 9 [C. A.]. (*d*) 46 & 47 Vict. c. 52.

priorities of debts shall bind the Crown. Apparently, therefore, the former rule of the Court of Chancery admitting the Crown to priority by virtue of its prerogative must also now be considered inapplicable to the administration by the Court of insolvent estates (*e*).

Preferential right of particular creditors.

As long as the rule in bankruptcy as to payment of creditors depended solely upon s. 40 of the Bankruptcy Act, 1883 (*f*), it remained for some time a question whether the exceptions to the general rule of *pari passu* payment in favour of particular creditors, contained in that section, were applicable to the administration by the Court of insolvent estates of deceased persons, or had reference only to proceedings in bankruptcy (*g*). That section, however, is now partly repealed and partly re-enacted by the Preferential Payments in Bankruptcy Act, 1888 (*h*), which is made to apply in the case of an order made after December 31st, 1888, for the administration of the estate (*i*) of a deceased person dying insolvent, as if such person were a bankrupt, and as if the date of his death were substituted for the date of the receiving order. The first two sections of this enactment are as follows:

Priority of debts.

"**1.**—(1) In the distribution of the property of a bankrupt, . . . there shall be paid in priority to all other debts—

"(a) All parochial or other local rates due from the bankrupt . . . at the date of the receiving

(*e*) The decisions in *Re Oriental Bank Corporation*, 28 Ch. D. 643; *Re Williams, Jones* v. *Williams*, 36 Ch. D. 573; *Re Churchill, Manisty* v. *Churchill*, 39 Ch. D. 174, so far as they suggest the contrary, appear to be inconsistent with the later view of the Court of Appeal as to the meaning of s. 10 of the Judicature Act, 1875. *In re Bentinck*, [1897] 1 Ch. 673, may be regarded as overruled by the decision of the Court of Appeal in *Re Samson*, [1906] 2 Ch. 584, discussed *ante*, p. 201; moreover, no order for administration appears to have been made in that case.

(*f*) 46 & 47 Vict. c. 52.

(*g*) *Cf. Re Albion Steel and Wire Co.*, 7 Ch. D. 547; *Re Association of Land Financiers*, 16 Ch. D. 373. See now *Re Leng, Tarn* v. *Emmerson, supra; Re Whitaker, Whitaker* v. *Palmer, supra.*

(*h*) 51 & 52 Vict. c. 62.

(*i*) *Re Heywood, Parkington* v. *Heywood*, [1897] 2 Ch. 593.

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order . . . and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax assessed on the bankrupt . . . up to the fifth day of April next before the date of the receiving order, . . . and not exceeding in the whole one year's assessment;

"(b) All wages or salary of any clerk or servant in respect of services rendered to the bankrupt . . . during four months before the date of the receiving order, . . . not exceeding fifty pounds; and

"(c) All wages of any labourer or workman not exceeding twenty-five pounds, whether payable for time or for piecework, in respect of services rendered to the bankrupt . . . during two months before the date of the receiving order . . .: Provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service up to the date of the receiving order, . . .

"(2) The foregoing debts shall rank equally between themselves and shall be paid in full, unless the property of the bankrupt is . . . insufficient to meet them, in which case they shall abate in equal proportions between themselves.

"(3) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the foregoing debts shall be discharged forthwith so far as the property of the debtor . . . is . . . sufficient to meet them.

"(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of a bankrupt . . . within three months next before the date of the receiving order . . . the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof.

"Provided, that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom such payment is made.

"(5) This section, so far as it relates to the property of a bankrupt, shall have effect as part of section 40 of the Bankruptcy Act, 1883.

"(6) This section shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order.

Savings.

"**2.**—(1) Nothing in this Act shall alter the effect of section five of the Act twenty-eight and twenty-nine Victoria, chapter eighty-six, "To amend the law of partnership," or shall prejudice the provisions of the Friendly Societies Act, 1875, or shall affect the priority given to the payment of funeral and testamentary expenses by section one hundred and twenty-five of the Bankruptcy Act, 1883.

"(2) Nothing in this Act shall affect the provisions of the Stannaries Act, 1887."

In addition to the priority in respect of rates and wages imported by the above enactment into the administration by the Court of insolvent estates (*k*), and to the priority of friendly societies in respect of moneys due to them by their officers (*l*), it would seem that workmen in respect of compensation due to them from their employers (*m*), and the trustees of any savings bank in respect of moneys due to the bank from a deceased actuary (*n*), will be entitled to preference over the general body of creditors in payment of their claims; but that no priority can be claimed in the administration by the Court of insolvent estates under any statute, passed prior to the Preferential Payments in Bankruptcy Act, 1888, relating to the observance of priorities in the payment of debts by executors and administrators (*o*), the effect of which is not continued by the Act of 1888, or by some later enactment (*p*).

(*k*) See *Re Heywood, Parkington* v. *Heywood*, [1897] 2 Ch. 593.
(*l*) See now 59 & 60 Vict. c. 25, s. 35.
(*m*) See 60 & 61 Vict. c. 37, s. 5.
(*n*) See 54 & 55 Vict. c. 21, s. 13, *ante*, p. 218.
(*o*) *Ante*, pp. 215 *et seq.*
(*p*) See *Re Williams, Jones* v. *Williams*, 36 Ch. D. 573.

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Clerk or servant.

As to what constitutes an employment as clerk or servant, labourer or workman, within the meaning of the Act, see Treatise upon the Law and Practice of Bankruptcy, by Sir R. VAUGHAN WILLIAMS (*q*).

SECTION IV.

AS TO THE PROOF RIGHTS OF SECURED CREDITORS.

The proof rights of secured creditors against the estate of a deceased person whose estate is insolvent and is being administered by the Court, are, by s. 10 of the Judicature Act, 1875 (*r*), made to depend upon the rules for the time being in force under the law of bankruptcy (*s*).

Rule in *Mason* v. *Bogg*.

A secured creditor, under the rule formerly established in equity in *Mason* v. *Bogg* (*t*), had a considerable advantage, in the matter of proof, over unsecured creditors, inasmuch as he could prove for his whole debt and, at the same time, rely upon his security for any balance which, owing to a deficiency of assets, might remain unpaid. The general effect of s. 10 of the Judicature Act, 1875, incorporating into the administration by the Court of the insolvent estates of deceased persons, the rules in bankruptcy "as to the respective rights of secured and unsecured creditors," is to render realisation, surrender, or assessment of his security by a secured creditor, a condition precedent to any proof by him whatever (*u*).

Present rules as to proof by secured creditor.

By s. 39 of the Bankruptcy Act, 1883 (*x*), it is provided that the following rules, among others, contained

(*q*) (8th ed.), pp. 157, 158; *Re Klein, Ex parte Goodwin*, 22 T. L. R. 664; *Cairney* v. *Back*, [1906] 2 K. B. 746, 753.

(*r*) 38 & 39 Vict. c. 77.

(*s*) *Re McMurdo, Penfield* v. *McMurdo*, [1902] 2 Ch. 684, 709 [C. A.].

(*t*) 2 My. & C. 443.

(*u*) See *Ex parte Good*, 14 Ch. D. 82.

(*x*) 46 & 47 Vict. c. 52.

in the Second Schedule to that Act are to regulate the right of proof by secured creditors:

> Rule 9. "If a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised."
>
> Rule 10. "If a secured creditor surrenders his security to the official receiver or trustee for the general benefit of the creditors, he may prove for his whole debt."
>
> Rule 11. "If a secured creditor does not either realise or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

Right of creditor to rest on his security.

There is nothing in the Bankruptcy Act to prevent a secured creditor resting upon his security if he chooses, and holding entirely aloof from the administration proceedings; and it is expressly provided that the institution of bankruptcy proceedings is not to affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if no such proceedings had been commenced (*y*).

Right of secured creditor to prove after issue of certificate.

Where a creditor in the first instance relies on his security, and it turns out afterwards, but during the course of the administration, that his security is worthless, or has greatly depreciated in value, the fact that the time limited for coming in to prove has elapsed, or that the master's certificate has been issued, does not absolutely preclude him from proving in the administration at all. In such a case he may apply to the Court for leave to come in and prove at any time so long as there remain assets undistributed. Provided that no injustice will be caused, leave will be granted, subject to no prior distribution being disturbed,

(*y*) 46 & 47 Vict. c. 52, s. 9 (2).

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and to such terms generally as the Court thinks fit to impose (*z*).

Claims for interest.

Although a mortgagee is entitled, upon realising his security under his power of sale, to apply the proceeds of sale, if sufficient for the purpose, in payment to himself of the full amount of his debt with interest and costs up to date; he will only be allowed, in proving in bankruptcy under the above rules, to charge interest up to the date of the receiving order (*a*).

As to sales by the Court of mortgaged property, see a Treatise on the Law of Mortgages, by the late L. G. Gordon Robbins (*b*).

Surrender of prior security.

Where a first mortgagee surrenders his security, the result will be to put the personal representative or official receiver, as the case may be, in his place, and not to accelerate the rights of subsequent mortgagees (*c*).

Procedure where creditor assesses his security.

Rules 12—17 determine the rights of executor and creditor where the latter elects to put a value upon his security. It is provided that the executor may redeem upon payment of the assessed value (*d*), or may require the property to be sold (*e*); but the creditor may by notice require the executor either to take one course or the other; and if within six months from the date of the notice the executor does not comply, it is provided that the equity of redemption in the property shall vest in the creditor, and the amount of the debt be reduced by the amount of the assessed value (*f*).

(*z*) *Re McMurdo, Penfield* v. *McMurdo*, [1902] 2 Ch. 684 [C. A.]. See *Kit Hill Tunnel, Ex parte Williams*, 16 Ch. D. 590. As to the right of a secured creditor to come in and prove at any time before final distribution in the case of the administration by the Court of a solvent estate, see *Harrison* v. *Kirk*, [1904] A. C. 1.

(*a*) *Re London, Windsor, etc. Hotels Co.*, [1892] 1 Ch. 639.

(*b*) Page 1094.

(*c*) *Cracknall* v. *Janson*, 6 Ch. D. 735.

(*d*) Rule 12 (a).

(*e*) Rule 12 (b).

(*f*) Rule 12 (c).

Provision is also made for amending valuations made upon a mistaken estimate (*g*), and in case of realisation of the property by the executor or creditor (*h*).

SECTION V.

ADMINISTRATION IN BANKRUPTCY.

Jurisdiction of Court of Bankruptcy.

By the Bankruptcy Act, 1883 (*i*), as amended by the Bankruptcy Act, 1890 (*k*), a jurisdiction concurrent with that of the Chancery Division and the County Courts is conferred upon the Court of Bankruptcy to administer the estates of debtors who have died insolvent.

By s. 125 of the Act of 1883 it is enacted as follows:

Administration in bankruptcy of estate of person dying insolvent.

"(1) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy.

"(2) Upon the prescribed notice being given to the legal personal representative of the deceased debtor, the Court may, in the prescribed manner, upon proof of the petitioner's debt, unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may upon cause shown dismiss such petition with or without costs."

(*g*) Rules 13, 14. See *Re Safety Explosives, Limited*, [1904] 1 Ch. 226; *Re Rowe, Ex parte West Coast Goldfields, Limited*, [1904] 2 K. B. 489.

(*h*) Rule 15.

(*i*) 46 & 47 Vict. c. 52.

(*k*) 53 & 54 Vict. c. 71.

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The Court referred to in this section is, of course, the Court having jurisdiction in bankruptcy under the Act (*l*).

The prescribed forms for the petition, the notice to the personal representative, and the administration order, are given in the Appendix of Forms to the Act (*m*).

Order for administration in bankruptcy may now be made at any time.

Under sub-s. (3) of this section an order could not be made until after two months from probate or grant of administration, except with the concurrence of the personal representative of the deceased, or upon proof that the deceased had committed an act of bankruptcy within three months prior to his decease; but these restrictions are removed by the Act of 1890 (*n*), which enacts as follows:

Administration in bankruptcy of estate of person dying insolvent.

> Section 21.—"(1) An order for the administration of a deceased person's estate may be made under section one hundred and twenty-five of the principal Act before the expiration of two months from the date of the grant of probate or letters of administration without the concurrence or proof mentioned in sub-section three of that section."

No valid objection can be raised to a petition under these sections on the ground that at the date of its service probate or administration to the estate of the deceased has not yet been granted, provided that such probate or administration is granted before the hearing of the petition (*o*).

Transfer into bankruptcy of proceedings commenced in Chancery Division.

Where procedings for the administration of a deceased debtor's estate have already been commenced in the Chancery Division, provision is made by s. 125 of the Act of 1883 for the transference of such pro-

(*l*) See s. 168. As to the power of the Court to direct a consolidation of the proceedings in two estates, one of which is that of a deceased person, see *Re Greaves*, [1904] 2 K. B. 493.

(*m*) See Williams' Bankruptcy Practice (8th ed.), pp. 481, 513.

(*n*) 53 & 54 Vict. c. 71.

(*o*) *Re Sleet*, [1894] 2 Q. B. 797 [C. A.].

ceedings into bankruptcy by order of the judge before whom they were commenced.

Sub-section (4) of the above-mentioned section enacts that:

> "A petition for administration under this section shall not be presented to the Court after proceedings have been commenced in any Court of justice for the administration of the deceased debtor's estate, but that Court may *in such case, on the application of any creditor and* on proof that the estate is insufficient to pay its debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and thereupon such last-mentioned Court may, in the prescribed manner, make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor."

The words in s. 125, "in such case, on the application of any creditor and," are repealed by s. 21 (2) of Act of 1890 (*p*), whereby it is enacted that:

> "The power under the same section to transfer to a Court exercising jurisdiction in bankruptcy proceedings commenced in any other Court for the administration of a deceased debtor's estate may be exercised without the application of any creditor, and whenever the latter Court is satisfied that the estate is insufficient to pay its debts."

Jurisdiction to transfer discretionary.

The power of the Chancery Division to transfer the administration of an insolvent estate to the Court of Bankruptcy is a discretionary power to be exercised according to the circumstances of the case (*q*). If there is no reason against the transfer, it will generally be made; but there may be reason for refusing to make a transfer where difficult questions of law may arise necessitating reference to the judge from time to time,

(*p*) 53 & 54 Vict. c. 71.

(*q*) *Re Baker, Nichols* v. *Baker*, 44 Ch. D. 262. See *Re Weaver, Higgs* v. *Weaver*, 29 Ch. D. 236; *Re York, Atkinson* v. *Powell*, 36 Ch. D. 233.

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or where the proceedings are far advanced, judgment having been pronounced and inquiries already made (*r*).

Effect of order for transfer into bankruptcy.

The remaining sub-sections (*s*) of s. 125 of the Act of 1883 are directed towards working out the effect of an order made under the section. The principal provisions of these sub-sections are that, upon an order under the section being made, the property of the debtor is to vest in the Official Receiver as trustee, who is forthwith to realise and distribute the same in accordance with the provisions of the Bankruptcy Act (*t*); that, subject to the provisions of sub-ss. (7)—(9), the provisions of Part III. of the Bankruptcy Act are to apply so far as the same are applicable (*u*); that the proper funeral and testamentary expenses incurred by the personal representative are to be a preferential debt in the distribution of the estate (*x*); that any surplus remaining in the hands of the Official Receiver after payment in full of debts, costs, and interest as in bankruptcy, is to be handed over to the personal representative or dealt with in such other manner as may be prescribed (*y*); and that notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition under the section shall, in the event of an order under the section being made thereon, be deemed to be equivalent to notice of an act of bankruptcy, and that after such notice, no payment or transfer of property made by the legal personal representative, shall operate as a discharge to him as between himself and the Official Receiver; but that, save as aforesaid, nothing in the section shall invalidate any payment made, or any act

(*r*) *Re Kenward, Hammond* v. *Eade*, 94 L. T. 277.
(*s*) Sub-ss. (5)—(11).
(*t*) Sub-s. (5).
(*u*) Sub-s. (6). See *infra*.
(*x*) Sub-s. (7).
(*y*) Sub-s. (8).

or thing done in good faith by the legal personal representative before the date of the order for administration (*z*).

Assets to be administered in bankruptcy, how determined.

It appears now to be settled that the assets to be administered by the Court of Bankruptcy, under an order made pursuant to s. 125 of the Act of 1883, are precisely those which would be administered by the Court of Chancery if no such order were made (*a*), and that, accordingly, whether the estate is being administered in the Court of Bankruptcy or in the Chancery Division, those cases are equally applicable which have decided (*b*) that an insolvent estate of a deceased person is to be administered without regard to those rules of bankruptcy which merely go to swell the assets to be distributed.

Order does not operate to swell the assets to be administered.

Thus, although by sub-ss. (5), (6) above referred to, it is declared that an order for the administration in bankruptcy of the insolvent estate of a deceased person is to have the effect of vesting the property of the deceased debtor in the Official Receiver for distribution according to the law of bankruptcy, the order will not operate to enlarge the property to be distributed, or deprive third parties of any rights which they have acquired to withdraw from distribution assets in their possession and which they have a right to retain (*c*). Where, therefore, an executrix had got in a sum of £1,100, in respect of which a right of retainer for £600 owing to her by the deceased had attached, but had not

(*z*) Sub-s. (9). See *Hasluck* v. *Clark*, [1899] 1 Q. B. 699, 704 [C. A.].

(*a*) *Hasluck* v. *Clark*, [1899] 1 Q. B. 699, at p. 704 [C. A.]; overruling *dicta* in *Watkins* v. *Barnard*, [1897] 2 Q. B. 521.

(*b*) See *ante*, pp. 272, 273.

(*c*) *Ex parte Official Receiver*, *Re Gould*, 19 Q. B. D. 92 [C. A.]; *Hasluck* v. *Clark*, [1899] 1 Q. B. 699 [C. A.]; overruling *dicta* in *Watkins* v. *Barnard*, [1897] 2 Q. B. 521; *Re Rhodes*, [1899] 2 Q. B. 347 [C. A.].

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been asserted by her, and subsequently an administration order was made under s. 125 for the administration of the estate in bankruptcy, it was held that the order had not prejudiced the right of the executrix to retain, but had operated to vest in the Official Receiver the balance of the sum of £1,100 after deducting the sum of £600 owing to the executrix (*d*).

(*d*) *Re Rhoades, supra.*

PART III.

OF DISTRIBUTION AMONG BENEFICIARIES.

CHAPTER XII.

OF THE DIFFERENT KINDS OF LEGACIES.

Duty of executor toward beneficiaries

AFTER the funeral and testamentary expenses and debts of the testator have been fully paid, and a sufficient fund has, if necessary, been set apart to meet contingent liabilities, the next duty of the personal representative, if he be executor or administrator *cum testamento annexo*, is to pay or provide for all legacies and annuities, if any, given by the will, to transfer, by assent or conveyance, the specifically devised real estate vesting in him by virtue of the Land Transfer Act, 1897 (*a*), and to distribute the residuary real and personal estate to or for the benefit of the persons specified, and in manner directed, by the will.

Notice to beneficiary.

It is, however, no part of the duty of an executor to give notice to a legatee or devisee of the benefits conferred upon him by the will, even though the executor is himself entitled under the will to an interest in the bequeathed or devised property (*b*).

(*a*) *Ante*, pp. 71 *et seq.*

(*b*) *Re Lewis, Lewis* v. *Lewis*, [1904] 2 Ch. 656 [C. A.]; *Re Mackay, Mackay* v. *Gould*, [1906] 1 Ch. 25.

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Definition of Legacy.

A legacy is defined by Swinburne to be "a gift left by the deceased, to be paid or performed by the executor or administrator" (*c*).

The expression "legacy" is properly appropriate to a gift of chattels; the expression "devise" to a gift of lands (*d*); but a devise equally with a legacy is a "gift" taking effect of the bounty of the testator and according to his expressed intention (*e*).

Legacies void for uncertainty.

Where there is in effect no "gift," as where the words of the will do not sufficiently indicate the subject-matter of, or the person to be benefited by, the gift, the intended legacy or devise is said to be void for want of certainty (*f*). Thus, a request that a handsome gratuity should be given to each of the executors, occurring in a codicil to the will, was held void for uncertainty (*g*). So also a direction by a testatrix that one-half of the residue of her estate should be applied "for such charitable or public purposes as my trustee thinks proper," the words "charitable or public purposes" being read disjunctively, was held void for uncertainty (*h*).

On the same ground, apparently, a gift to "next-of-kin or heir-at-law whom I appoint my executor," was held ineffective, and the property comprised in the intended gift was ordered to be distributed according to the Statute of Distributions (*i*).

There are two descriptions of legacies, namely, specific legacies and general legacies; the latter class

(*c*) 7th ed., p. 35.

(*d*) Godolph. (3rd ed.), p. 271.

(*e*) Swinb. (7th ed.), p. 35. See *Eastwood* v. *Vinke*, 2 P. Wms. 616.

(*f*) Godolph. (3rd ed.), pp. 447, 448.

(*g*) *Jubber* v. *Jubber*, 9 Sim. 503. See *Peck* v. *Halsey*, 2 P. Wms. 387; *Re Gray*, *Dresser* v. *Gray*, 36 Ch. D. 205; *Re Hetley*, *Hetley* v. *Hetley*, [1902] 2 Ch. 866.

(*h*) *Blair* v. *Duncan*, [1902] A. C. 37.

(*i*) *Lowndes* v. *Stone*, 4 Ves. 649; *cf. Re Thompson's Trusts*, 9 Ch. D. 607.

of legacies are also more nearly described as legacies of quantity or number (*k*).

Specific legacy.

A specific legacy is conferred by a bequest of a specific article belonging to the testator, or of a specific part of his estate intended to pass unconditionally, and in *statu quo* to the legatee. Everything will fall under the description of a specific legacy "which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed in the state and condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate" (*l*).

General legacy.

A general legacy is conferred by a bequest defining only the quantity or value of the benefit intended to accrue to the legatee.

Rules for distinguishing between specific and general legacies.

The two classes of legacies are clearly distinguished by Sir GEORGE JESSEL, in *Bothamley* v. *Sherson* (*m*), as follows:

"In the first place it [*i.e.*, a specific legacy] is a part of the testator's property. A general bequest may or may not be a part of the testator's property. A man who gives £100 money or £100 stock may not have either the money or the stock, in which case the testator's executors must raise the money or buy the stock; or he may have money or stock sufficient to discharge the legacy, in which case the executors would probably discharge it out of the actual money or stock. But in the case of a general legacy it has no reference to the actual state of the testator's property, it being only supposed that the testator has sufficient property which, on being realised, will procure for the legatee that which is given to him, while in the case of a specific bequest it must be of a part of the testator's property itself. That is the first thing.

(*k*) Swinb. (7th ed.), p. 308.

(*l*) *Per* Lord SELBORNE in *Robertson* v. *Broadbent*, 8 App. Cas, 812, 815, 820.

(*m*) L. R. 20 Eq. 304, 308.

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"In the next place it must be a part emphatically, as distinguished from the whole. It must be what has been sometimes called a severed or distinguished part. It must not be the whole, in the meaning of being the totality of the testator's property, or the totality of the general residue of his property after having given legacies out of it. But if it satisfy both conditions, that it is a part of the testator's property itself and is a part as distinguished, as I said before, from the whole or from the whole of the residue, then it appears to me to satisfy everything that is required to treat it as a specific legacy."

After-acquired property.

Whether or not a legacy is of a part of the testator's property is a question of fact and raises no difficulty. So long as the thing bequeathed is the testator's at the time of his death, it is capable of being given as a specific legacy (*n*).

Severance a question of construction.

But whether or not a particular thing is so bequeathed as to be severed from the general personal estate applicable for the payment of general legacies, is often a difficult question of construction, depending on circumstances and the tenor of the will.

Articles enumerated in residue.

Thus, a gift of specific articles which, if standing alone, would have been construed as specific, where followed by a gift of the residue of the estate, has been held to be general, on the ground that, in the latter case it amounts merely to an enumeration of some of the particulars making up the residue (*o*).

As a gift of the residue of personalty is general, so a gift in general terms of the whole personal estate to

(*n*) *Stewart* v. *Denton*, 4 Doug. 219; *Fontaine* v. *Tyler*, 9 Price, 98; *Stephenson* v. *Dowson*, 3 Beav. 342; *Bothamley* v. *Sherson*, L. R. 20 Eq. 304; *Re Overy*, *Broadbent* v. *Barrow*, 20 Ch. D. 679; *Re Bridger*, *Brompton Hospital* v. *Lewis*, [1899] 1 Ch. 331 [C. A.].

(*o*) *Dummer* v. *Pitcher*, 5 Sim. 35; 2 My. & K. 262; *Fielding* v. *Preston*, 1 De G. & J. 438; *Bothamley* v. *Sherson*, L. R. 20 Eq. 304; *Fairer* v. *Park*, 3 Ch. D. 309; *Re Green*, *Baldock* v. *Green*, 40 Ch. D. 610, 618.

which a testator may be entitled at the time of his death is general (*p*).

Gift of annuity.

A gift of an annuity, whether charged upon land (*q*) or not (*r*) is a legacy of quantity merely and is general; but the gift of a rent or an annuity by way of rent-charge issuing out of land is as much specific as a gift of the land itself (*s*).

Expression of purpose of gift.

The purpose for which a general legacy is to be applied will not alter its nature (*t*). Thus, a gift of "£50 for a ring" is general (*u*).

Cases in which severance will be inferred.

Although the Courts are averse from construing legacies to be specific (*x*), yet, if the words clearly indicate an intention to separate the particular thing bequeathed from the general property of the testator, they shall have that operation. Hence, under some circumstances, even pecuniary legacies are held to be specific (*y*).

Thus, a legacy of a sum of money in a certain bag (*z*), a legacy of a particular debt, as of a bond or other security (*a*), and the forgiveness of a debt (*aa*), have been held specific.

So a bequest by one partner to another of £2,000 which appeared to be due to him on the last settlement if he did not draw it out of trade before he died, was

(*p*) *Ouseley* v. *Anstruther*, 10 Beav. 453; *Fairer* v. *Park*, 3 Ch. D. 312; *Robertson* v. *Broadbent*, 8 App. Cas. 812.

(*q*) *Paget* v. *Huish*, 1 H. & M. 663; *Davies* v. *Ashford*, 15 Sim. 42; *Creed* v. *Creed*, 11 Cl. & F. 491; *Re Trenchard*, *Trenchard* v. *Trenchard*, [1905] 1 Ch. 82, 92.

(*r*) *Hume* v. *Edwards*, 3 Atk. 693; *Lewin* v. *Lewin*, 2 Ves. 415, 417.

(*s*) *Long* v. *Short*, 1 P. Wms. 403.

(*t*) *Hinton* v. *Pinke*, 1 P. Wms. 540.

(*u*) *Apreece* v. *Apreece*, 1 V. & B. 364.

(*x*) *Ellis* v. *Walker*, Amb. 310; *Davies* v. *Fowler*, L. R. 16 Eq. 308, 312.

(*y*) Toller (7th ed.), p. 301.

(*z*) *Lawson* v. *Stitch*, 1 Atk. 508.

(*a*) *Ashburner* v. *Macguire*, 2 Bro. C. C. 108; *Hinton* v. *Pinke*, *supra*; *Hosking* v. *Nicholls*, 1 Y. & C. 478; *Re Pratt*, *Pratt* v. *Pratt*, [1894] 1 Ch. 491.

(*aa*) *Re Wedmore*, *Wedmore* v. *Wedmore*, [1907] 2 Ch. 277, 283.

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held to be specific (*b*); and again, pecuniary legacies directed to be paid out of a particular debt, the residue of which was itself specifically given, have been treated as specific legacies (*c*).

Severance inferred from context.

A mere bequest of a certain number of bonds or shares, as of "500 Egyptian 9 per cent. bonds," or "50 shares in the York Union Banking Company," without any words to make it apparent that the testator intended to dispose of bonds or shares which he held at the date of his will, is general (*d*); but similar bequests, accompanied by expressions in the will only to be explained upon the supposition that the testator was dealing with property which he possessed, have been held specific (*e*).

Legacy of exact amount owned by testator.

If a testator, in bequeathing stock, describes and disposes of the exact sum he has at the time of the bequest, it will be a strong circumstance, though not by itself conclusive, to show that the legacy is intended to be specific (*f*); and the fact that the testator bequeathed stock to a greater amount than that possessed by him does not prevent the bequest from being specific (*g*).

Words of severance—"my."

The description by a testator of the subject bequeathed by the possessive pronoun "my" has been frequently relied on as a circumstance tending to show that a legacy is specific (*h*); and may still be relied on

(*b*) *Ellis* v. *Walker*, Amb. 309.

(*c*) *Re Grainger, Dawson* v. *Higgins*, [1900] 2 Ch. 756, 766 [C. A.], reversed on construction of will, [1902] A. C. 1.

(*d*) *Macdonald* v. *Irvine*, 8 Ch. D. 101 [C. A.]; *Re Gray, Dresser* v. *Gray*, 36 Ch. D. 205.

(*e*) *Re Nottage, Jones* v. *Palmer* (No. 2), [1895] 2 Ch. 657.

(*f*) *Jeffreys* v. *Jeffreys*, 3 Atk. 120. See *Re Young, Trye* v. *Sullivan*, 52 L. T. 754; *Re Doyle, Burke* v. *Doyle*, [1897] 1 Ir. R. 479.

(*g*) *Gordon* v. *Duff*, 3 De G. F. & J. 662, 664.

(*h*) *Ashburner* v. *Macguire*, 2 Bro. C. C. 108, at p. 112. See *Kirby* v. *Potter*, 4 Ves. 748; *Miller* v. *Little*, 2 Beav. 259; see also *Humphreys* v. *Humphreys*, 2 Cox, 184; *Macdonald* v. *Irvine*, 8 Ch. D. 101 [C. A.].

for that purpose, notwithstanding the provisions of the Wills Act (*i*).

"Now standing in my name."

So a bequest of stock "now standing in my name" has been held specific (*k*).

"If a testator gives a thing which he has as 'money now in the funds,' 'money now in a box,' or 'money now in a stocking,' or a specific chattel or anything which can be distinctly earmarked, as the thing which he intended to give, that is a specific legacy" (*l*).

"Situate at."

Again, a bequest of articles or property described by reference to their local situation, as of all a testator's personal estate at W., is as much a specific bequest as if the several particulars had been enumerated (*m*).

So bequests of "all things in the house remaining of whatsoever kind," and "all moneys, both in the house and out of it," have been held specific (*n*).

"Out of."

A bequest of an amount of stock "out of" specific stock is specific (*o*), but a bequest of money "out of" stock, being a legacy of quantity, is general (*p*). Thus a gift of "£800 to be paid out of the consols standing in my name" is not a specific legacy, but a gift of "£800 invested in 2½ per cent. consols" has been held to be specific (*q*). A bequest of "*the sum* of £3,000 invested in Indian security" has been held not to be

(*i*) *Bothamley* v. *Sherson*, L. R. 20 Eq. 304. See *Re Portal and Lamb*, 30 Ch. D. 50 [C. A.].

(*k*) *Penticost* v. *Ley*, 2 Jac. & W. 207.

(*l*) *Page* v. *Young*, L. R. 19 Eq. 501, 506.

(*m*) *Sayer* v. *Sayer*, 2 Vern. 688; *Beaufort* v. *Beaufort*, 2 Vern. 739; *Oliver* v. *Oliver*, L. R. 11 Eq. 506.

(*n*) *Collins* v. *Collins*, L. R. 12 Eq. 455.

(*o*) *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478; *Morley* v. *Bird*, 3 Ves. 629; *McClellan* v. *Clark*, 50 L. T. (N.S.) 616; *Re Pratt, Pratt* v. *Pratt*, [1894] 1 Ch. 491.

(*p*) *Selwood* v. *Mildmay*, 3 Ves. 306; *Kirby* v. *Potter*, 4 Ves. 748; *Deane* v. *Test*, 9 Ves. 146. See *Booth* v. *Alington*, 6 De G. M. & G. 613; *Findlater* v. *Lowe*, [1904] 1 I. R. 519.

(*q*) *Re Pratt, Pratt* v. *Pratt*, *supra*.

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specific (*r*); and *a fortiori* a direction to invest so much money as will produce a certain sum of stock is not specific (*s*).

Gifts of real estate.

The rule that, in order to render a gift specific, an intention must be shown to sever the subject of the gift from the rest of the general personal estate of the testator, does not apply in the case of gifts of real estate. Real estate is not primarily liable, with the general personal estate, for the payment of debts and legacies (*t*), and is accordingly regarded as severed by a presumption of law from the latter estate. Thus, a devise of real estate, whether by way of specific description or by way of residuary devise, is specific (*u*).

Demonstrative legacies.

A general legacy given primarily out of a particular fund, instead of out of the estate at large, but consisting only of a definite sum of money, and not amounting to a gift of the fund itself or any aliquot part of it, is called a demonstrative legacy (*x*). A demonstrative legacy is, therefore, a general legacy to the bequest of which a direction is added rendering a particular fund primarily applicable for its payment (*y*).

(*r*) *Mytton* v. *Mytton*, L. R. 19 Eq. 30.

(*s*) *Edwards* v. *Hall*, 11 Hare, 23.

(*t*) See *post*, Chaps. XIV., XVI.

(*u*) *Hensman* v. *Fryer*, L. R. 3 Ch. App. 420; *Lancefield* v. *Iggulden*, L. R. 10 Ch. App. 136. See *Tomkins* v. *Colthurst*, 1 Ch. D. 626.

(*x*) *Mullins* v. *Smith*, 1 Drew. & Sm. 204; *Smith* v. *Fitzgerald*, 3 V. & B. 5; *Kirby* v. *Potter*, 4 Ves. 748; *Disney* v. *Crosse*, L. R. 2 Eq. 592; *Hodges* v. *Grant*, L. R. 4 Eq. 140. See *Re Pratt*, *Pratt* v. *Pratt*, [1894] 1 Ch. 491, and cases cited *supra*.

(*y*) See *Fowler* v. *Willoughby*, 2 Sim. & St. 354; *Re Tyler*, *Tyler* v. *Tyler*, 65 L. T. 367.

CHAPTER XIII.

OF THE FAILURE OF LEGACIES AND DEVISES.

SECTION I.

OF LAPSE.

A LEGACY or devise may fail by lapse or by ademption of the gift in the lifetime of the testator; or by reason of the legatee or devisee being an attesting witness to the will.

General rule as to lapse by death of legatee in testator's lifetime.

Lapse of a legacy or devise may be occasioned by the death of the beneficiary in the lifetime of the testator, or after his death.

As a general rule, if a beneficiary named in the will die during the lifetime of the testator, the gift lapses (*a*), and it makes no difference that words of limitation are added to the gift as if it is expressed to be made to the legatee, his executors, administrators, or assigns (*b*), or to him and his heirs (*c*). "The reason of its [the gift] thus lapsing is found in the ambulatory nature of a will, which does not come into operation until the testator's death (*d*); a deceased person cannot take

(*a*) 4 Bac. Abr. (7th ed.) 387; *Elliott* v. *Davenport*, 1 P. Wms. 83; *Hutcheson* v. *Hammond*, 3 Bro. C. C. 128; *Re Hensler, Jones* v. *Hensler*, 19 Ch. D. 612. See *Sibthorpe* v. *Moxom*, 3 Atk. 580, 582; *Re Joy, Purday* v. *Johnson*, 60 L. T. 175. The case of a devisee of an estate tail dying in the lifetime of the testator, leaving issue, who would be inheritable under the entail is provided for by s. 32 of the Wills Act, 1837, and forms an exception to the general rule. A further exception is provided by s. 33 of the same Act in favour of children or other issue of the testator dying in his lifetime leaving issue living at his death. See *post*, p. 306.

(*b*) *Maybank* v. *Brooks*, 1 Bro. C. C. 84; *Bone* v. *Cook*, M'Clel. 168.

(*c*) *Tidwell* v. *Ariel*, 3 Madd. 403.

(*d*) See *per* Lord DAVEY, in *Beddington* v. *Baumann*, [1903] A. C. 13, at p. 19.

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under a will, just as a deceased person cannot take under a deed, which has an immediate operation" (*e*).

Alternative gift.

To exclude the general rule, it is not sufficient that the testator signifies or indicates his intention that the gift shall not lapse in the event of the beneficiary predeceasing him (*f*). To effect this purpose, an alternative gift must be expressed (*g*). Thus, a gift to A. "and failing him by decease before me to his heirs" (*h*), or to named persons "or to their heirs" (*i*), or to named persons "or to their respective legal personal representatives" (*k*) will not lapse, but will take effect in favour of the persons designated by the expression heirs or legal representatives; and a clear indication of intention that upon the death of the legatee named, in the lifetime of the testator, the estate of the legatee is to have the benefit of the legacy, may be sufficient to prevent lapse (*l*).

Gift over.

Where the will contains a gift over after the death of the first legatee, the effect of the first legatee predeceasing the testator is merely to accelerate the gift over, and the legatee in remainder becomes immediately entitled upon the death of the testator (*m*). So where a legacy was given to A. for life with a power of appointment exercisable by will, and, in default of appointment, to persons in remainder; it was held, that upon the death of A. in the lifetime of the testator, the

(*e*) *Re Harvey's Estate, Harvey* v. *Gillow*, [1893] 1 Ch. 567, 570.

(*f*) *Sibley* v. *Cook*, 3 Atk. 573.

(*g*) *Ibid.* See *Bridge* v. *Abbott*, 3 Bro. C. C. 224; *Browne* v. *Hope*, L. R. 14 Eq. 343.

(*h*) Toller (7th ed.), p. 303.

(*i*) *Gittings* v. *M'Dermott*, 2 My. & K. 69. See *Rose* v. *Rose*, 17 Ves. 347.

(*k*) *Bridge* v. *Abbott*, 3 Bro. C. C. 224; *Re Thompson, Machell* v. *Newman*, W. N. (1886), 130.

(*l*) See *Williamson* v. *Naylor*, 3 Y. & J. 208; *Stevens* v. *King*, [1904] 2 Ch. 30.

(*m*) *Hardwick* v. *Thurston*, 4 Russ. 380. See *Lee* v. *Pain*, 4 Hare, 201, 227; *Rider* v. *Wager*, 2 P. Wms., at p. 331.

gift in remainder took effect immediately, and that it made no difference that A. might have defeated the gift over had she survived the testator (*n*).

No lapse by death of one of several joint tenants.

A gift to two or more persons, or persons and corporations (*o*), as joint tenants, does not lapse as to the share of one person dying, or of the corporation ceasing to exist, in the lifetime of the testator, but vests in its entirety in the survivors (*p*).

Husband and wife.

Where the persons among whom the gift is made include a husband and wife, the husband and wife take as one person (*q*) a single share in joint tenancy (*r*); and, accordingly, the share of either predeceasing the testator will vest in the survivor of the two, and will not be devisable among all the objects of the gift.

Joint tenancy or tenancy in common.

It is a general rule of construction that a gift to several persons without any words of severance accompanying the gift, creates a joint tenancy, and not a tenancy in common (*s*).

But words of severance such as "equally" or "share and share alike," or similar words, added to the gift, will be sufficient to create a tenancy in common (*t*); and where, although there are no express words of severance, the gift is to the persons who would be entitled as the next-of-kin under the Statute of Distributions, the presumption is that such persons are intended to take in the shares prescribed by the statute, and not as joint

(*n*) *Chatteris* v. *Young*, 6 Madd. 30.

(*o*) 62 & 63 Vict. c. 20, s. 1.

(*p*) *Buffar* v. *Bradford*, 2 Atk. 220; *Rider* v. *Wager*, 2 P. Wms., at p. 331; *Pearce* v. *Edmeades*, 3 Y. & C. 246, 251; *Re Buller*, *Buller* v. *Giberne*, 74 L. T. 406.

(*q*) *Re March*, *Mander* v. *Harris*, 27 Ch. D. 166 [C. A.]; *Re Jupp*, *Jupp* v. *Buckwell*, 39 Ch. D. 148.

(*r*) *Thornley* v. *Thornley*, [1893] 2 Ch. 229.

(*s*) *Morley* v. *Bird*, 3 Ves. 629; *M'Gregor* v. *M'Gregor*, 1 De G. F. & J. 63; *Kenworthy* v. *Ward*, 11 Hare. 196; *Re Hodgson's Trusts*, 1 Kay & J. 178; *Re Kerr's Trusts*, 4 Ch. D. 600.

(*t*) *Re Yates*, *Bostock* v. *D'Eyncourt*, [1891] 3 Ch. 53.

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tenants (*u*). Anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy, and to create a tenancy in common (*x*). So a power of advancement given to trustees has been held inconsistent with the construction of a joint tenancy among beneficiaries (*y*).

Whether share of one of several tenants in common lapses.

Where one of several persons to whom a gift is made as tenants in common, dies in the lifetime of the testator, the question whether the share of the person so dying will lapse or will be distributable among the survivors, depends upon whether the gift is to persons *nominatim* or to the members of a class. For this purpose, a gift is said to be to a "class" of persons, "when it is to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares" (*z*).

Description of "class" gifts.

A gift, however, may be none the less a class gift because some of the individuals of the class are named. Thus, a gift to several named children and all afterborn children, is a gift to a class (*a*); and, although a gift to A., a named individual, and all the children of B., is *primâ facie* not a class gift (*b*), yet, if the Court, putting itself into the same position as the testator occupied, with the same knowledge as the

(*u*) *Bullock* v. *Downes*, 9 H. L. Cas. 1.

(*x*) *Per* Lord HATHERLEY, in *Robertson* v. *Fraser*, L. R. 6 Ch. App. 696, 699.

(*y*) *L'Estrange* v. *L'Estrange*, [1902] 1 I. R. 372; *Re Woolley, Wormald* v. *Woolley*, [1903] 2 Ch. 206.

(*z*) *Pearks* v. *Moseley*, 5 App. Cas. 714, 723. See *Dimond* v. *Bostock*, L. R. 10 Ch. App. 358; *Kingsbury* v. *Walter*, [1901] A. C. 187, at p. 192.

(*a*) *Re Stanhope's Trusts*, 27 Beav. 201; *Re Jackson, Shiers* v. *Ashworth*, 25 Ch. D. 162. See *Shaw* v. *M'Mahon*, 4 Dr. & W. 431.

(*b*) *Re Chaplin's Trusts*, 12 W. R. 147; *Re Allen, Wilson* v. *Atter*, 44 L. T. (N.S.) 240; *Re Featherstone's Trusts*, 22 Ch. D. 111; *Re Venn, Lindon* v. *Ingram*, [1904] 2 Ch. 52.

testator had when he was writing his will, comes to the conclusion that such a gift was intended to operate as a class gift, it will be so construed (*c*). It is essential to the construction of a gift as a class gift that all the interests of members of the class are made to vest in interest at the same time (*d*).

General rule as to lapse by death of one of several tenants in common taking *nominatim*.

A gift to several persons (not being children or other issue of the testator) as tenants in common *nominatim* will lapse upon the death before the testator of any of them to the extent of the share of the persons so dying (*e*).

So where a testator bequeathed the residue of his estate to trustees to pay and transfer the same to seven named legatees "in equal seventh shares as tenants in common and to their respective executors, administrators and assigns," although the will contained a declaration that such shares should be vested interests in each legatee immediately upon the execution thereof; it was held that the share of a legatee who died after the date of the will, but before the testator, must be treated as lapsed (*f*).

But, as in the case of an ordinary legacy, a share may be prevented from lapsing if the testator clearly indicates who is to take in case the legatee should die in his lifetime (*g*). Thus, a testator may give property

(*c*) *Per* Lord DAVEY, in *Kingsbury* v. *Walter*, [1901] A. C. 187, at p. 193. See *Aspinall* v. *Duckworth*, 35 Beav. 307; *Kekewich* v. *Barker*, 88 L. T. 130.

(*d*) *Drakeford* v. *Drakeford*, 33 Beav. 45, 48; *Kingsbury* v. *Walter*, *supra*, at p. 194.

(*e*) *Peat* v. *Chapman*, 1 Ves. sen. 542; *Page* v. *Page*, 2 P. Wms. 489; *Bain* v. *Lescher*, 11 Sim. 397; *Re Smith's Trusts*, 9 Ch. D. 117; *Re Roberts*, *Tarleton* v. *Bruton*, 30 Ch. D. 234 [C. A.]. See and distinguish *Re Pinhorne*, *Moreton* v. *Hughes*, [1894] 2 Ch. 276; *Re Powell*, *Campbell* v. *Campbell*, [1900] 2 Ch. 525; *Re Whitmore*, *Walters* v. *Harrison*, [1902] 2 Ch. 66. See also *Re Spiller*, *Spiller* v. *Madge*, 18 Ch. D. 614.

(*f*) *Browne* v. *Hope*, L. R. 14 Eq. 343. See *Appleton* v. *Rowley*, L. R. 8 Eq. 139.

(*g*) *Mackinnon* v. *Peach*, 2 Keen, 555; *Baxter* v. *Losh*, 14 Beav. 612; *Browne* v. *Hope*, *supra*; *Re Featherstone's Trusts*, 22 Ch. D. 111, 121.

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to persons as tenants in common, and yet declare that, on the death of one, the other shall take his share, and this would amount to nearly the same thing as giving it in joint tenancy (*h*).

No lapse by death of one of several tenants in common taking as a "class."

Where the gift is to a "class" of persons as tenants in common, the shares of any one or more of them dying in the lifetime of the testator, will not lapse, but will enure to the benefit of, and be distributable among, the survivor or survivors (*i*).

Exception to general rule in favour of children or issue taking *nominatim*.

In the case of a gift to children or other issue of the testator, as tenants in common *nominatim*, the ordinary rule as to lapse is altered by s. 33 of the Wills Act (*k*), which enacts as follows:

> "Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Exception does not extend to children taking as a "class."

It has been held that the above section does not apply to a gift to children or other issue of the testator as a class; but that in the event of the death before the testator, of any child contingently entitled under such a gift, the ordinary rule applies, and the prospective share of the child so dying, is divisible among the survivors (*l*).

(*h*) See *Baxter* v. *Losh*, *supra*, at p. 615.

(*i*) *Viner* v. *Francis*, 2 Cox, 190; *Doe* v. *Sheffield*, 13 East, 526; *Lee* v. *Pain*, 4 Hare, 250; *Leigh* v. *Leigh*, 17 Beav. 605; *Re Coleman and Jarrom*, 4 Ch. D. 165; *Re Smith's Trusts*, 9 Ch. D. 117; *Re Jackson*, *Shiers* v. *Ashworth*, 25 Ch. D. 162.

(*k*) 7 Will. 4 & 1 Vict. c. 26. See *Pearce* v. *Graham*, 32 L. J. Ch. 359; *Re Hone's Trusts*, 22 Ch. D. 663.

(*l*) *Olney* v. *Bates*, 3 Drew. 319; *Browne* v. *Hammond*, Joh. 210; *Sir E. Harvey's Estate*, *Harvey* v. *Gillow*, [1893] 1 Ch. 567.

Nor does it apply to prevent lapse where, in the events which happen, the class consists of but one individual who predeceases the testator leaving issue (*m*).

The effect of the section in cases to which it applies, is to render the property devised or bequeathed a part of the estate of the deceased child, and capable of being effectually disposed of by his will (*n*). A gift of money to be divided "between my nine children" was held to be a gift to the nine children of the testator *nominatim*, and to fall within the section (*o*).

Death of trustee.

A legacy or devise will not lapse by the death in the testator's lifetime of any person to whom a bequest or devise is made in the character of trustee (*p*).

General rule as to lapse by death of legatee after testator.

With regard to lapse occasioned by the death of the beneficiary subsequently to the date of the testator's death, the general rule is that a legacy or devise is subject to lapse so long as the will remains contingent; but that a gift once vested, will devolve upon the representative of the beneficiary according to law.

Gift vested or contingent.

Whether a particular gift is to be treated as vested or contingent, must be a question of construction to be determined by reference to the terms of the gift; and care must be taken to distinguish between gifts made contingent and vested gifts, the time of payment only of which is postponed (*q*).

(*m*) *Sir E. Harvey's Estate*, *Harvey* v. *Gillow*, [1893] 1 Ch. 567.

(*n*) *Johnson* v. *Johnson*, 3 Hare, 157; *Winter* v. *Winter*, 5 Hare, 306; *Re Scott*, [1901] 1 K. B. 228. See *Re Hensler*, *Jones* v. *Hensler*, 19 Ch. D. 612.

(*o*) *Re Stansfield*, *Stansfield* v. *Stansfield*, 15 Ch. D. 84.

(*p*) *Oke* v. *Heath*, 1 Ves. 140.

(*q*) See the rules of construction affecting the question discussed: Hawkins on Wills, pp. 221 *et seq.* See *Re Eve*, *Belton* v. *Thompson*, 93 L. T. 235.

SECTION II.

OF ADEMPTION.

Definition.

A legacy or devise may also be made void by ademption, which is defined to be "a taking away of the legacy by the testator expressly in fact, or in construction of law" (*r*).

Express ademption—revocation.

An ademption "expressly in fact" of a gift by will may be occasioned by the express revocation either of the whole will, or of the particular gift (*s*).

Ademption in the ordinary sense.

Ademption "in construction of law" may be occasioned in either of two ways, namely, by the conversion in the lifetime of the testator of property devised or specifically bequeathed by him; or, by the advancement of legatees in the lifetime of the testator in satisfaction of legacies given to them as portions, or for a particular purpose.

Ademption by conversion.

First, with regard to the ademption of specific legacies or devises occasioned by conversion.

Where the gift is of a specific chattel little difficulty can arise in determining whether there has been a dealing with the article since the date of the will, sufficient to cause an ademption of the gift. Whenever the testator alters the form, so as to alter the specification of the subject—as by making wool into cloth, or a piece of cloth into a garment—there the legacy is adeemed (*t*). So, the loss, destruction (*u*), or sale (*x*), of an article specifically bequeathed will operate as an ademption; but a mere direction to sell (*y*), or a mortgage or pledge (*z*) of the article, will not have that effect.

(*r*) Godolph. (3rd ed.), p. 449.
(*s*) Swinb. (7th ed.), 1006.
(*t*) *Ashburner* v. *Macguire*, 2 Bro. C. C. 108.
(*u*) *Durrant* v. *Friend*, 5 De G. & Sm. 343.
(*x*) 3 Swinb. (7th ed.), p. 1012. See cases cited *infra*.
(*y*) *Harrison* v. *Asher*, 2 De G. & Sm. 436.
(*z*) *Ashburner* v. *Macguire*, *supra*, at p. 113. See *Oakes* v. *Oakes*, 9 Hare, 666, 672.

Removal of property bequeathed.

The mere removal of goods specifically bequeathed may amount to an ademption of the legacy, if the situation of the goods at the place from which they have been removed form an essential part of the description of the goods bequeathed (*a*). So, where a testator gave to his wife his house in B., and the furniture in the said house, the lease of the house having expired in the lifetime of the testator and the furniture having been removed into another house, it was held that the testator made the bequest of the furniture with reference to giving the lease, and that he had in contemplation an enjoyment of the house with the furniture, and, consequently, that the bequest had totally failed by the change of circumstances (*b*).

But a specific bequest of goods made with reference to their locality will not fail by reason of their removal, where the object of the removal was merely temporary (*c*).

Change of property unauthorised by testator.

There was a time when the Courts held that all cases of ademption arose from a supposed alteration of the intention of the testator (*d*). Ademption, therefore, being dependent upon a presumed intention on the part of the testator, it was held in old days that where a change was effected by public authority, or without the will of the testator, ademption did not follow. But for many years that has ceased to be law (*e*).

Ademption of debts.

Questions as to the ademption of debts, stock, or other choses in action, specifically bequeathed often present some difficulty. Whether in the case of such legacies, ademption has taken place or not must depend

(*a*) *Chapman* v. *Hart*, 1 Ves. sen. 271, 273. See *Heseltine* v. *Heseltine*, 3 Madd. 276.

(*b*) *Colleton* v. *Garth*, 6 Sim. 19.

(*c*) *Chapman* v. *Hart*, 1 Ves. sen. 271, 273; *Brooke* v. *Earl of Warwick*, 2 De G. & Sm. 425, 426; *Land* v. *Devaynes*, 4 Bro. C. C. 537; *Rawlinson* v. *Rawlinson*, 3 Ch. D. 302.

(*d*) *Partridge* v. *Partridge*, Cas. *t.* Talb. 226.

(*e*) *Per* COZENS-HARDY, M.R., in *Re Slater*, *Slater* v. *Slater*, [1907] 1 Ch. 665, 671.

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upon the answer to the inquiry "whether the testator has at the time of his death the same thing existing, it may be in a different shape—yet substantially the same thing" (*f*). "If you cannot find it at the testator's death, it is no use trying to trace it unless you can trace it in this sense, that you find something which has been changed in name and form only, but which is substantially the same thing" (*g*).

Thus, the receipt by the testator of a debt specifically bequeathed by him, or the calling in of money due to him upon security and mixing it with other moneys, being an extinguishment of the subject-matter of the bequest, is an ademption of the legacy bequeathed (*h*). And the receipt by the testator of part of a debt will operate as an ademption *pro tanto* (*i*).

But where a testatrix specifically bequeathed a trust fund, which was deposited in the name of trustees, and to which she was entitled, at the date of her will, in remainder, and subsequently, upon the life interest falling in, the trustees, without instructions from the testatrix, transferred the fund to the testatrix's deposit account, it was held that no such conversion had taken place as to effect any ademption of the legacy (*k*).

In *Morgan* v. *Thomas* (*l*), where the bequest was of "all the real and personal estate which I am or shall or may be entitled to under the will of my late uncle," and subsequently to the date of his will, the testator had received £800 part of his share under the will of his uncle and had invested it in £600 stock, Sir EDWARD FRY, in order to give effect to what appeared from the

(*f*) *Per* TURNER, V.-C., in *Oakes* v. *Oakes*, 9 Hare, 666, 672.

(*g*) *Per* COZENS-HARDY, M.R., in *Re Slater*, [1907] 1 Ch. at p. 672.

(*h*) *Stanley* v. *Potter*, 2 Cox, 180; *Fryer* v. *Morris*, 9 Ves. 360; *Jenkins* v. *Jones*, L. R. 2 Eq. 323; *Harrison* v. *Jackson*, 7 Ch. D. 339; *Re Bridle*, 4 C. P. D. 336; *Manton* v. *Tabois*, 30 Ch. D. 92, 98; *Re Robe*, *Slade* v. *Walpole*, 61 L. T. 497.

(*i*) *Ashburner* v. *Macguire*, 2 Bro. C. C. 108.

(*k*) *Re Vickers*, *Vickers* v. *Mellor*, 81 L. T. 719.

(*l*) 6 Ch. D. 176. See *Re Kenyon's Estate*, *Mann* v. *Knapp*, 56 L. T. 626; *Manton* v. *Tabois*, 30 Ch. D. 92.

will to be the intention of the testator, decided that the bequest applied to personal estate derived under the will of the uncle in whatever form it might be found at the death of the testator, provided only that it was distinguishable from the rest of his estate, and so removed altogether the necessity of applying the doctrine of ademption.

Ademption of stock.

With regard to stock, it has been held that a sale by the testator for the purpose of re-investment, works an ademption of the stock bequeathed, for the transaction is, in effect, a conversion of the stock in the first instance, and then, the application by the testator of his own money in buying something which is not the specific article bequeathed by him (*m*).

So, a bequest of mortgage debentures was held to be adeemed by the exercise of an option by the testator, after the date of the will, to take debenture stock in the same company in lieu of debentures (*n*).

So, again, in *Re Slater, Slater* v. *Slater* (*o*), a bequest of "the interest arising from money invested in the L. Waterworks Company" was held to be adeemed by the conversion of the stock of the waterworks company into Metropolitan Water stock under the Metropolis Water Act, 1902.

But a change of investment by trustees of a fund specifically bequeathed under a power of varying investments (*p*), or the conversion by resolution of the company of shares specifically bequeathed into consolidated stock (*q*), or, by Act of Parliament, of stock

(*m*) *Harrison* v. *Jackson*, 7 Ch. D. 339; *Macdonald* v. *Irvine*, 8 Ch. D. 101.

(*n*) *Re Lane, Luard* v. *Lane*, 14 Ch. D. 856.

(*o*) [1907] 1 Ch. 665.

(*p*) See *Jones* v. *Southall*, 32 Beav. 31, 41; *Re Johnstone's Settlement*, 14 Ch. D. 162.

(*q*) *Oakes* v. *Oakes*, 9 Hare, 666; *Re Foreman, Watson* v. *Watson*, W. N. (1899), 95.

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specifically bequeathed into annuities (*r*), has been held to work no ademption.

So, also, a legacy of Consols "standing in my name" was held not to be adeemed by the subsequent transfer of the Consols into the name of the Paymaster-General, under an order in Lunacy (*s*); but a sale under an order in Lunacy of stock specifically bequeathed was held an ademption of the stock (*t*).

Ademption of share in partnership.

A specific bequest of a share in a partnership will be adeemed if the testator, after he has made his will, leaves the firm and receives his share (*u*). But the substitution of new articles of partnership for the articles existing at the date of the will, although altering the share of the testator in the business, works no ademption (*x*); and by virtue of s. 23 of the Wills Act (*y*), the acquisition of a larger interest will not affect, in the slightest degree, a disposition which the testator has made by will prior to such acquisition, of all the interest he had in the houses, chattels, and other property in the co-partnership business, although the partnership has ceased to exist, and he has become the sole owner of the property (*z*).

An appointment of specifically described property is subject to ademption in like manner as a specific legacy or devise (*a*). There is no distinction for this purpose between general and special powers of appointment (*b*).

(*r*) *Partridge* v. *Partridge*, Cas. *t.* Talb. 226. See *Bronsdon* v. *Winter*, Amb. 57.

(*s*) *Re Wood, Anderson* v. *London City Mission*, [1894] 2 Ch. 577.

(*t*) *Re Freer, Freer* v. *Freer*, 22 Ch. D. 622.

(*u*) Lindley on Partnership (7th ed.), p. 682. See *Aston* v. *Wood*, 43 L. J. Ch. 715; *Farquhar* v. *Hadden*, L. R. 7 Ch. App. 1.

(*x*) *Backwell* v. *Child*, Amb. 260.

(*y*) 7 Will. 4 & 1 Vict. c. 26.

(*z*) *Re Russell, Russell* v. *Chell*, 19 Ch. D. 432.

(*a*) *Gale* v. *Gale*, 21 Beav. 349; *Blake* v. *Blake*, 15 Ch. D. 481; *Beddington* v. *Baumann*, [1903] A. C. 13.

(*b*) *Re Dowsett, Dowsett* v. *Makin*, [1901] 1 Ch. 398; *Beddington* v. *Baumann*, *supra*, at p. 16.

Demonstrative legacy.

A demonstrative legacy being a legacy of quantity with a particular security indicated for its payment, is not adeemed by the total or partial failure of the particular security (*c*).

Ademption of interests in land by merger.

Gifts of real estate and leaseholds were often adeemed in former times by reason of the testator's limited interest in the land becoming destroyed by merger, upon the acquisition by him, after the date of the will, of a larger interest in the same property. But such cases are now provided for by s. 23 of the Wills Act (*d*), which enacts as follows:

> "No conveyance or other Act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised . . . shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death."

The construction of the above section came before the Court in *Cox* v. *Bennett* (*e*). In that case the testator bequeathed to trustees certain house property, which he described as leasehold, upon trust for the benefit of his wife for life, and after her death as she should appoint generally, and he also made a residuary devise and bequest of realty and personalty. After the date of his will the testator purchased the reversion of the leaseholds, which he had given for the benefit of his wife, and took a conveyance to himself in fee. The question was, whether the freehold interest passed to the trustees in trust for his wife, and GIFFARD, V.-C., said: "I think this is one of those cases which it was intended that the Wills Act should operate upon. The clause in the statute says that the will is to pass such estate or interest in such

(*c*) *Fowler* v. *Willoughby*, 2 Sim. & St. 354; *Willox* v. *Rhodes*, 2 Russ. 452; *Livesay* v. *Redfern*, 2 Y. & C. 90.

(*d*) 7 Will. 4 & 1 Vict. c. 26.

(*e*) L. R. 6 Eq. 422.

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real or personal estate as the testator shall have power to dispose of at his death; and there is nothing in the will to confine its operation to the interest which the testator had at the date of the will. The mere method which the testator adopts of describing his property is not equivalent to saying, 'I give the leasehold interest,' and nothing else. There is, I think, in this description abundant to carry the freehold interest in the property."

So, again, where the bequest was of "all my term and interest in the leasehold dwelling-house and premises known as . . . subject to the payment of the ground-rent and performance of the covenants affecting the same," it was held that the section applied and that the subsequent purchase by the testator of the freehold of the house did not adeem the bequest (*f*).

But where a testator having specifically devised real estate afterwards sold it, and then took a mortgage of it to secure part of the purchase-money, it was held that s. 23 of the Wills Act had no application, and that no beneficial interest passed under the will to the devisee (*g*).

Ademption of general legacies by advancement.

Secondly, with regard to ademption in construction of law by advancement *inter vivos*.

A general legacy may be impliedly adeemed should the testator, after the date of the will, make provision *inter vivos* for the person in whose favour the bequest is expressed to be made. Ademption of this kind is founded upon a rule of presumption against double portions (*h*). The rule is clearly stated and the limits

(*f*) *Saxton* v. *Saxton*, 13 Ch. D. 359. See also *Struthers* v. *Struthers*, 5 W. R. 809; *Miles* v. *Miles*, L. R. 1 Eq. 462; *Wedgwood* v. *Denton*, L. R. 12 Eq. 290.

(*g*) *Re Clowes*, [1893] 1 Ch. 214 [C. A.].

(*h*) *Suisse* v. *Lowther*, 2 Hare, 424, 435; *Hopwood* v. *Hopwood*, 7 H. L. Cas. 728; *Re Furness*, *Furness* v. *Stalkartt*, [1901] 2 Ch. 346.

Advancement to child.

of the doctrine fully discussed by Lord SELBORNE in *Re Pollock, Pollock* v. *Worral* (*i*) as follows: "When a testator gives a legacy to a child, or to any other person towards whom he has taken on himself parental obligations, and afterwards makes a gift or enters into a binding contract in his lifetime in favour of the same legatee, then (unless there be distinctions between the nature and conditions of the two gifts, of a kind not in this case material) (*k*), there is a presumption *primâ facie* that both gifts were made to fulfil the same natural or moral obligation of providing for the legatee; and consequently that the gift *inter vivos* is either wholly or in part a substitution for, or an 'ademption' of the legacy. This presumption has in some cases of that class (see particularly *Hopwood* v. *Hopwood* (*l*)) been carried to a great length. It was at one time thought, that the ademption in such a case would be (*primâ facie*) total, although the amount of the subsequent advancement might be less than that of the legacy. But in *Pym* v. *Lockyer* (*m*), in which the whole doctrine was carefully examined and explained by Lord COTTENHAM, that learned Judge corrected this error, and the rule established by *Pym* v. *Lockyer* (*m*) is, that when the donor is a parent, or *in loco parentis*, and when the amount of the subsequent gift is less than that of the legacy, the mere presumption does not go beyond an ademption *pro tanto*.

Advancement of less amount than legacy.

Advancement to stranger for particular purpose of legacy.

"The presumptions arising out of the parental relation do not of course extend to any case in which the legatee is a stranger to that relation. But numerous authorities have determined that if a legacy appears on the face of the will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to have been made for

(*i*) 28 Ch. D. 552.
(*k*) See *infra*.
(*l*) 7 H. L. Cas. 728. See *infra*.
(*m*) 5 My. & Cr. 29.

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the same purpose, a similar presumption is raised *primâ facie* in favour of ademption. And it is clear from the authorities that evidence of the circumstances under which the subsequent gift was made, including contemporaneous or substantially contemporaneous declarations of the donor (whether communicated to the donee or not), may be admissible in such a case. To constitute a particular purpose within the meaning of that doctrine it is not, in my opinion, necessary that some special use or application of the money, by or on behalf of the legatee (*e.g.*, for binding him an apprentice, purchasing for him a house, advancing him upon marriage, or the like), should be in the testator's view (*n*). It is not less a purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfilment of some moral obligation recognised by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognised, or would have presumed to exist. And it appears to me that a case of this kind comes very near, in principle, to the first class of cases, in which ademption by a subsequent gift is inferred from the parental relation. The reasonable presumption is the same, namely, that as the purpose of both gifts was to fulfil one and the same antecedent obligation or duty, a double fulfilment was (presumably) not intended."

The facts of the case, from the LORD CHANCELLOR'S judgment in which the above extract is taken, were as follows: A testatrix by her will bequeathed to a niece of her deceased husband £500, adding to the bequest the words "according to the wish of my late beloved husband"; after the date of the will, the testatrix paid £300 to the same legatee, and contemporaneously

(*n*) See *Pankhurst* v. *Howell*, L. R. 6 Ch. App. 136; *Re Fletcher*, *Gillings* v. *Fletcher*, 38 Ch. D. 373.

made an entry in her diary to the effect that the £300 so paid was a legacy from the legatee's uncle, namely, her deceased husband. It was held that the payment of the sum of £300 was an ademption *pro tanto* of the legacy of £500.

A legacy to a trustee for the benefit of an infant is but a legacy to the infant, and is not a legacy for a particular purpose within the meaning of the rule as above stated by Lord SELBORNE (*o*). On the other hand, a legacy to trustees for the purpose of apprenticing A. B., a stranger, or for the purpose of making an endowment for the benefit of A. B., a stranger, for his life with remainder to his children, and *a fortiori* a legacy to trustees for the endowment of a hospital, will constitute a gift for a particular purpose within the meaning of the rule (*p*).

Question of "*in loco parentis*," is one of evidence.

Except in the case of father and child, the mere nearness of kin of one person to another, will not constitute the one *in loco parentis* to the other so as to raise a presumption of ademption; but each case will depend upon its own circumstances (*q*).

Doctrine not applied to share of residue given to child so as to benefit stranger.

Although the result of the application of the doctrine in the case of an ordinary legacy given to a child must necessarily be to benefit the persons, whoever they may be, claiming under a gift of residue, the doctrine will not be applied to the case of a share of residue given to a child where the result would be to benefit a stranger (*r*); and where, in a recent case, a legacy was given to a child to whom the testator stood *in loco parentis*, and the residue was divided between that child and a stranger, it was held that the doctrine of

(*o*) *Re Smythies, Weyman* v. *Smythies*, [1903] 1 Ch. 259.

(*p*) *Re Corbett, Corbett* v. *Cobham*, [1903] 2 Ch. 326.

(*q*) *Bennet* v. *Bennet*, 10 Ch. D. 475; *Re Smythies, supra*. See *Fowkes* v. *Pascoe*, L. R. 10 Ch. App. 343, 350.

(*r*) *Meinertzagen* v. *Walters*, L. R. 7 Ch. App. 670; *Fowkes* v. *Pascoe, supra*. See *Stewart* v. *Stewart*, 15 Ch. D. 539, 547.

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ademption could not be applied as against the child in favour of the stranger, and that neither the legacy nor the share of residue were adeemed (*s*).

No ademption where gifts of different nature.

Distinctions between the nature and conditions of the gift by will and the subsequent gift *inter vivos*, may altogether prevent the presumption against double portions from arising (*t*). So the presumption has been held not to arise where the bequest by will is absolute and the subsequent gift *inter vivos* is made subject to a contingency (*u*); nor where the two gifts are not *ejusdem generis* (*w*); nor where the circumstances of the gift *inter vivos* are not such as to justify its being treated in the first instance as in the nature of a portion at all (*x*), as for instance where it is made expressly in satisfaction of a claim *aliunde* (*y*), or is in the nature of temporary assistance only (*z*).

Gifts not *ejusdem generis*.

The rule as to the necessity of the two gifts being *ejusdem generis* is explained by JESSEL, M.R., in *Re Lawes, Lawes* v. *Lawes* (*a*) as follows: "Where a testator gives to a child a beneficial lease or share of works, or any other thing, and says nothing about the value, he is not to be taken to be giving it in satisfaction of a pecuniary bequest; but where he does refer to the value the presumption of satisfaction may arise." In the case referred to, a gift by a father to his son of a share in a partnership business, which in the articles

(*s*) *Re Heather, Pumfrey* v. *Fryer*, [1906] 2 Ch. 230.

(*t*) *Re Lacon, Lacon* v. *Lacon*, [1891] 2 Ch. 482 [C. A.]; *Re Scott, Langton* v. *Scott*, [1903] 1 Ch. 1 [C. A.].

(*u*) *Spinks* v. *Robins*, 2 Atk. 490.

(*w*) *Grave* v. *Salisbury*, 1 Bro. C. C. 424; *Holmes* v. *Holmes, ib.*, 555; *Bengough* v. *Walker*, 15 Ves. 507; *Davys* v. *Boucher*, 3 Y. & C. 397, 411; *Re Jaques, Hodgson* v. *Braisby*, [1903] 1 Ch. 267 [C. A.]. See *Re Vickers, Vickers* v. *Vickers*, 37 Ch. D. 525.

(*x*) *Re Lacon, supra; Re Scott, supra.*

(*y*) *Baugh* v. *Read*, 1 Ves. jun. 257.

(*z*) *Taylor* v. *Taylor*, L. R. 20 Eq. 155; *Re Scott, supra.* See also *post*, p. 350.

(*a*) 20 Ch. D. 81, 88 [C. A.].

of partnership was expressed to be taken at £19,000, was held practically equivalent to a gift by cheque of a sum of £19,000. Recent decisions have effected no change in this respect in the law with reference to the rule against double portions (*b*).

It is now settled that an absolute bequest may be adeemed by a subsequent settlement, and that in the case of a settled legacy, notwithstanding that there is a difference between the provision made by the will and the provision under the settlement, still the one may be a satisfaction of the other (*c*).

No ademption where proof of contrary intention.

The presumption against double portions being a presumption of law only, may of course be rebutted by evidence of intention to the contrary (*d*); but the burden of proof of intention to the contrary is upon the person claiming the double portion (*e*), and the presumption is not easily repelled (*f*). Thus in *Hopwood* v. *Hopwood* (*g*), referred to by Lord SELBORNE (*h*) as having carried the presumption to a great length, a testator by his will bequeathed two sums of £5,000 to each of his sons F. and H. Upon the subsequent marriage of F. the testator covenanted to pay the sum of £5,000 to the trustees of his marriage settlement. By a codicil made after the date of the marriage settlement the testator recited the gifts in the will of £5,000 to his two sons, and directed his trustees to raise two "further" sums of £7,000 for their benefit. It was

(*b*) *Re Jaques, Hodgson* v. *Braisby*, [1903] 1 Ch. 267 [C. A.]; in which case the observations of NORTH, J., to the contrary, in *Re Vickers, supra*, are dissented from.

(*c*) *Platt* v. *Platt*, 3 Sim. 503; *Re Furness, Furness* v. *Stalkartt*, [1901] 2 Ch. 346, 349. See *Trimmer* v. *Bayne*, 7 Ves. 508; *Baugh* v. *Read*, 1 Ves. jun. 257; *Durham* v. *Wharton*, 10 Bli. (N.S.) 526, 544. And *cf. Cartwright* v. *Cartwright*, [1903] 2 Ch. 306; *Re Blundell, Blundell* v. *Blundell*, [1906] 2 Ch. 222.

(*d*) *Chichester* v. *Coventry*, L. R. 2 H. L. 71.

(*e*) *Hopwood* v. *Hopwood*, 7 H. L. Cas. 728.

(*f*) See *Montagu* v. *Earl of Sandwich*, 32 Ch. D. 525 [C. A.].

(*g*) 7 H. L. Cas. 728.

(*h*) *Supra*, p. 315.

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held that there was nothing in the direction contained in the codicil to rebut the presumption that the legacy of £5,000 to F. contained in the will was adeemed by the subsequent settlement upon him of the same sum.

The whole of the circumstances in evidence, the time, circumstances, and manner of the gift, must be looked at; and should it appear that the testator, when making the gift, had not the disposition made by his will in any way in his mind, the presumption against double portions, which would otherwise be binding, may be taken to be rebutted (*i*). Thus, where a father, having advanced sums of £5,000 to each of his daughters and declared in his will that these sums were not to be brought into account for the purpose of ascertaining the share of residue to which either daughter should become entitled under his will, afterwards advanced sums of equal amount to each of his sons, it was held that all the circumstances of the case, taken together, were sufficient to displace the presumption (which arose) against double portions, and to leave as gifts merely the two sums of £5,000 advanced to the sons (*k*).

SECTION III.

OF GIFTS TO ATTESTING WITNESSES.

The failure of legacies or devises to attesting witnesses now depends upon the following section of the Wills Act (*l*), which embodies and extends a principle

(*i*) *Ravenscroft* v. *Jones*, 4 De G. J. & S. 228; *Re Scott*, *Langton* v. *Scott*, [1903] 1 Ch. 1, 17 [C. A.].

(*k*) *Re Scott*, *supra*. See *Re Lacon*, *Lacon* v. *Lacon*, [1891] 2 Ch. 482 [C. A.].

(*l*) 7 Will. 4 & 1 Vict. c. 26, s. 15.

of public policy involved in the former law upon the subject.

Section 15 of Wills Act.

"If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will."

Gift must be contained in instrument attested.

The above section applies to a gift as well by codicil as by will (*m*), but invalidates only gifts made to legatees or devisees by the same instrument which they attest (*n*). So a legatee may be entitled to a legacy under a will duly attested by witnesses other than himself, but disentitled to a further benefit under a codicil attested by him, and *vice versâ* (*o*).

Where a residuary legatee, under a will duly attested, of a share of residue, subsequently attested a codicil which revoked certain legacies in the will, and so increasing the residue, thereby indirectly benefited him, it was held that no "beneficial devise, legacy," etc. accrued to the legatee by virtue of the codicil, but that he took under the gift of residue contained in the will (*p*); but where by a duly attested will a gift was made to a legatee upon condition, and the legatee subsequently attested a codicil whereby the legacy was

(*m*) *Gaskin* v. *Rogers*, L. R. 2 Eq. 284. See also cases cited *infra*.

(*n*) *Gurney* v. *Gurney*, 3 Drew. 208.

(*o*) *Anderson* v. *Anderson*, L. R. 13 Eq. 381; *Re Marcus*, *Marcus* v. *Marcus*, 57 L. T. 399; *Re Trotter*, *Trotter* v. *Trotter*, [1899] 1 Ch. 764.

(*p*) *Ibid.*

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made absolute, it was held that a "beneficial devise, legacy," etc., was conferred by the codicil and failed accordingly (*q*).

Attestation by husband or wife.

Although a gift to the husband or wife of an attesting witness is void under the statute (*r*), the marriage, after attestation of a will, of a devisee to the attesting witness, has been held not to affect the validity of the devise (*s*).

Attestation by trustee.

The section does not operate to render void a legacy or devise to an attesting witness as trustee (*t*); but the attestation by any person named as *cestui que trust* either in the will or in a parol declaration to which the will refers, will extinguish his interest under the trust declared (*u*).

Superfluous attestation.

The signature of a person named as a legatee, to a will already duly attested, may be omitted from probate if the Court is satisfied that it was not written with the intention of attesting the signature of the deceased (*x*).

Republication of will by codicil.

A codicil duly attested and confirming a gift under a will to which the legatee is an attesting witness, will have the effect of republishing the will, and rendering it in effect a new and original disposition by the testator so far as concerns the gift contained in it (*y*).

Clause authorising professional charges.

Professional charges of a solicitor-executor are not a debt within the meaning of the exception as to debts contained in the section; a solicitor-executor or trustee, therefore, who has attested the will is not entitled to the benefit of a direction contained in the will authorising him to receive payment for professional business done in connection with the will (*z*).

(*q*) *Gaskin* v. *Rogers*, *supra*.
(*r*) *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69.
(*s*) *Thorpe* v. *Bestwick*, 6 Q. B. D. 311.
(*t*) *Cresswell* v. *Cresswell*, *supra*.
(*u*) *Re Fleetwood*, *Sidgreaves* v. *Brewer*, 15 Ch. D. 594.
(*x*) *In the Goods of Sharman*, L. R. 1 P. & D. 661; *In the Goods of E. J. Smith*, 15 P. D. 2.
(*y*) *Anderson* v. *Anderson*, L. R. 13 Eq. 381.
(*z*) *Re Barber*, *Burgess* v. *Vinnicome*, 31 Ch. D. 665; *Re Pooley*, 40 Ch. D. 1 [C. A.].

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Effect of failure of life interest.

The effect of attestation of a will by a person to whom a life interest is given, is to accelerate the gift in remainder, and not to cause an intestacy during the life of such person (*a*), except during such time as there are no persons entitled in remainder in existence (*b*).

Where, however, there is an absolute gift to a person if living at a certain period, and an alternative gift over, the effect of that person attesting the will and surviving at the period mentioned, is to create an intestacy, and not to give effect to the alternative gift the condition of which is not fulfilled (*c*).

(*a*) *Jull* v. *Jacobs*, 3 Ch. D. 703 ; *Re Clark*, *Clark* v. *Randall*, 31 Ch. D. 72.

(*b*) *Re Townsend's Estate*, *Townsend* v. *Townsend*, 34 Ch. D. 357.

(*c*) *Aplin* v. *Stone*, [1904] 1 Ch. 543.

CHAPTER XIV.

OF ASSETS FOR THE PAYMENT OF GENERAL LEGACIES.

SECTION I.

Of the General Rule and its Limitations.

General legacies being mere legacies of quantity (*a*), given without reference to the particular items of property of which the testator died possessed, and often amounting in the aggregate to a sum considerably in excess of the actual value of the testator's estate at the time of his death, it is important to consider out of what funds provision for such legacies must be made by the executor.

Statement of rule.

The general rule was stated and the principle of its application explained by Lord Selborne in *Robertson* v. *Broadbent* (*b*) (decided in the year 1883) as follows:

"The general rule of law as to pecuniary legacies (in the absence of any sufficient indication of a contrary intention) is, that they are payable by the legal personal representatives of the testator (in whom the whole personal estate vests by law) out of the personal estate not specifically bequeathed. The presumption is, that the testator intends them to be so paid. Unless charged upon it by the will they are not payable out of the real estate.

(*a*) *Ante*, p. 295.

(*b*) 8 App. Cas. 812, 815; *cf. Re Cameron, Nixon* v. *Cameron*, 26 Ch. D. 19, 25 [C. A.].

Exemption of personal estate specifically bequeathed.

"The principle of the exemption of personal estate specifically bequeathed is, that it is necessary to give effect to the intention apparent by the gift. If the bequest is of a particular chattel, such as a horse or a ship, it is manifest that the testator intended the thing itself to pass unconditionally, and in *statu quo*, to the legatee; which could not be if it were subject to the payment of funeral and testamentary expenses, debts, and pecuniary legacies. As against creditors the testator cannot wholly release it from liability for his debts; but as against all persons taking benefits under his will he may."

Contrary intention.

The general rule above stated has been established in accordance with the presumed intention of the testator, and is subject to be varied or wholly excluded if an intention on the part of the testator, that the legacies bequeathed by him are to be differently borne, can be gathered from the will (*c*).

Express contrary intention.

In the first place, a testator may, by express words, direct that general legacies shall be raised and paid out of a particular fund. Thus, either personal estate specifically bequeathed or the whole or any part of the real estate may, by words apt for the purpose, be charged with the payment of legacies, either to the total exoneration of the general personal estate (*d*), or *pari passu* with, or merely in aid of the general personal estate in the event of that estate proving insufficient for the purpose (*e*).

"Mixed fund" for payment of legacies.

Where a testator has constituted real and personal estate a "mixed fund" (*f*) for the payment of legacies,

(*c*) See *Allan* v. *Gott*, L. R. 7 Ch. App. 439.

(*d*) *Lance* v. *Aglionby*, 27 Beav. 65; *Jones* v. *Bruce*, 11 Sim. 221, 228; *Robertson* v. *Broadbent*, 8 App. Cas. 812, 816; *Re Needham*, *Robinson* v. *Needham*, 54 L. J. Ch. 75; *Re Grainger*, *Dawson* v. *Higgins*, [1900] 2 Ch. 756, 777 [C. A.].

(*e*) See cases cited *infra*.

(*f*) As to the manner in which a "mixed fund" for the payment of debts, legacies, or other charges, may be constituted, see *post*, pp. 366, 367.

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it will be assumed that he intends the legacies to be borne rateably by the real and personal estate respectively comprised in such fund (*g*).

But where a testator has created a "mixed fund," for the payment of debts only, or of debts and other specified charges not including legacies, and it happens that the legacies, by virtue of the rule of construction below mentioned, are charged generally upon real estate, the fact that they are so charged will not constitute the "mixed fund" for the payment of debts a "mixed fund" also for the payment of legacies, so as to render the real and personal estate respectively comprised therein liable rateably for the payment of legacies. The "mixed fund" will in such case be confined to the debts or other charges specified, and the general charge of legacies will bear its usual construction (*h*).

Implied contrary intention from scheme of will.

Secondly, an intention to charge real estate with the payment of legacies, though not expressed, may be gathered from the general scheme of the will. Thus it is a general and well established rule of construction that where the will contains bequests of general legacies followed by a gift of the residue of the real and personal estate of the testator, the real estate so devised is charged with the payment of legacies in aid of the general personal estate (*i*).

It has further been decided that the same inference is to be drawn where the subsequent gift of real and personal estate in substance amounts to a gift of residue, although the expressions "residue" or "the rest" or the like do not occur (*k*).

(*g*) *Roberts* v. *Walker*, 1 Russ. & My. 752, 767; *Kidney* v. *Coussmaker*, 1 Ves. jun. 436; *Bright* v. *Larcher*, 3 De G. & J. 148.

(*h*) *Elliott* v. *Dearsley*, 16 Ch. D. 322 [C. A.]; *Re Boards, Knight* v. *Knight*, [1895] 1 Ch. 499.

(*i*) *Greville* v. *Browne*, 7 H. L. Cas. 689; *Re Brooke, Brooke* v. *Rooke*, 3 Ch. D. 630; *Re Orey, Broadbent* v. *Barrow*, 31 Ch. D. 113, 118.

(*k*) *Re Bawden, National Provincial Bank of England* v. *Cresswell*, [1894] 1 Ch. 693; *Re Smith, Smith* v. *Smith*, [1899] 1 Ch. 365. See also *Bray* v. *Stevens*, 12 Ch. D. 162.

It is to be observed that the effect of the above rule of construction is to charge the realty in aid only of the personalty, and that the residuary real and personal estate are not by virtue thereof constituted a "mixed fund" for the payment of legacies proportionably and rateably (*l*).

Real estate specifically devised.

Real estate specifically devised will not be rendered applicable for the payment of legacies by reason merely of a general charge of legacies upon the real estate, or all the real estate, of the testator (*m*), and the rule is the same although there is no residuary real estate (*n*); but, in the words of Lord HERSCHELL in *Bank of Ireland* v. *McCarthy* (*o*), "after all it is a question of intention, and if there is something more or something other than the mere fact of a charge upon all his lands, then we have to consider from the whole will, what is the intention which we are to attribute to the testator."

Effect of Land Transfer Act, 1897, on general rule.

It has sometimes been suggested that the effect of the Land Transfer Act, 1897, has been to render real estate to which that Act applies liable with the general personal estate to the payment of legacies although not expressly charged with their payment.

As already explained the general rule that the general personal estate is assets for the payment of general legacies, to the exclusion of personal estate specifically bequeathed and of real estate, is founded upon the presumed intention of the testator. It is assumed in the absence of any indication of intention to the contrary contained in the will, that such legacies are given with reference to the general personal estate.

(*l*) *Elliott* v. *Dearsley*, *supra*; *Re Boards*, *Knight* v. *Knight*, *supra*, overruling on this point *Gainsford* v. *Dunn*, L. R. 17 Eq. 405.

(*m*) *Spong* v. *Spong*, 3 Bli. (N.S.) 84; *Conron* v. *Conron*, 7 H. L. Cas. 168.

(*n*) *Bank of Ireland* v. *McCarthy*, [1898] A. C. 181.

(*o*) *Ibid.*, at p. 185. *Cf. Castle* v. *Gillett*, L. R. 16 Eq. 530.

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It is clear, then, that inasmuch as before the Act, the presumption in no way depended upon the law as to the devolution of real and personal estate respectively, the mere fact that the Act now prescribes the same hand to administer real and personal estate, cannot affect the question. It is a fallacy to suppose that the Act creates a "mixed fund" of realty and personalty in the sense in which, upon the construction of a will, a mixed fund is sometimes said to be created by the testator.

Nor would it seem that the presumption is in any way affected by the provisions of s. 2 (3) of the Act, which provides as follows:

> "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies."

Meaning of "incidents."

Commenting upon this sub-section, JOYCE, J., in *Re Williams, Holder* v. *Williams* (*p*), observes that "*primâ facie* the object of the first part of the Act was, speaking generally, to simplify and improve the machinery for the administration of real assets without altering in any manner the ultimate rights of the persons beneficially interested in the proceeds of such assets." Adopting, then, in regard to "the provisions as to administration" contained in the sub-section, a construction in conformity with this view of the Act, there would appear to be little doubt that the "incidents" referred to are incidents of procedure, and not of substantive law relating to beneficial interests.

(*p*) [1904] 1 Ch. 52, at p. 56.

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Construction of proviso.

The concluding proviso of s. 2 (3) appears to dispose of any doubt which otherwise might have existed as to the meaning of the earlier part of the sub-section. It was indeed suggested in a former edition that the proviso is open to the construction that it is merely intended to preserve the right of a testator to charge legacies on real estate generally or specifically, so as to render the estate so charged liable to legacies primarily, or out of the order in which it would otherwise be liable by virtue of the Act. But the wording of the proviso, "nothing herein contained shall alter or affect . . . the liability of real estate to be charged with the payment of legacies" seems to preclude any such construction.

The power given to the personal representative by s. 4 (1) to appropriate any part of the residuary real estate to satisfy any legacy or share of residue is explained later (*q*) and does not conflict with the view here taken.

Result.

The result appears to be that the Act does not render the general personal estate of a deceased person any the less the natural and primary fund for the payment of debts or the only fund for payment of general legacies in any case in which it would have been so under the earlier law.

Demonstrative legacy—how far an exception to rule.

A general legacy directed to be paid primarily out of a specific fund is said to be "demonstrative" (*r*). A demonstrative legacy is so far an exception to the general rule above stated, that it is primarily payable to the exclusion of other general legacies, out of the particular fund indicated for its payment (*s*). A demonstrative legacy is not, however, liable to ademption by reason of the total or partial failure to meet it, of the particular fund (*t*), but to the extent of such failure,

(*q*) *Post*, p. 405.

(*r*) *Ante*, p. 300.

(*s*) *Tempest* v. *Tempest*. 7 De G. M. & G. 470; *Robinson* v. *Geldard*, 3 Macn. & G. 735, 745, 746; *Disney* v. *Crosse*, L. R. 2 Eq. 592, 596, 597.

(*t*) *Fowler* v. *Willoughby*, 2 Sim. & St. 354; *Willox* v. *Rhodes* Russ. 452; *Livesay* v. *Redfern*, 2 Y. & C. 90.

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becomes an ordinary general legacy payable *pari passu* with the rest of the general legacies (*u*).

Gift of residue—what is.

A bequest of the residue of the testator's personal estate, as has been seen (*x*), is a general legacy; but differs from other general legacies inasmuch as it is a gift, not *out of* the general personal estate of the testator, but *of* the general personal estate remaining after debts and legacies and testamentary expenses have been paid (*y*).

Lapsed and void legacies.

In the absence of contrary intention, lapsed and void legacies are to be treated as part of the general personal estate, and go to swell the gift of residue (*z*); and a gift of residue excepting certain property specifically bequeathed will carry with it the excepted property in the event of the specific bequest failing by lapse or otherwise; it being taken that the object of the testator in making the exception was simply to give the property in question to another; and, that being the sole object, there is no reason why, upon the failure of the bequest, it should not be held to be included in the residuary gift (*a*). If, however, the testator makes no disposition by will of the excepted property, this reasoning does not apply, and the excepted property passes as on an intestacy (*b*), though, to exclude a particular portion of the personal estate of a testator, not otherwise disposed of by his will, from a bequest of his residuary personal estate, it is necessary to find an intention not to include that portion even if it is his (*c*).

(*u*) *Mann* v. *Copland*, 2 Madd. 223; *Roberts* v. *Pocock*, 4 Ves. 150; *Hodges* v. *Grant*, L. R. 4 Eq. 140; *Re Pratt, Pratt* v. *Pratt*, [1894] 1 Ch. 491.

(*x*) *Ante*, p. 296.

(*y*) *Elborne* v. *Goode*, 14 Sim. 165; *Trethewy* v. *Helyar*, 4 Ch. D. 53; *Robertson* v. *Broadbent*, 8 App. Cas. 812, 817.

(*z*) *Cambridge* v. *Rous*, 8 Ves. 12, 25; *Leake* v. *Robinson*, 2 Mer. 363, 392; *Bernard* v. *Minshull*, 1 Johns. 276. See *Re Isaac, Harrison* v *Isaac*, [1905] 1 Ch. 427; and compare *Johns* v. *Wilson*, [1900] 1 Ir. R. 342.

(*a*) *Blight* v. *Hartnoll*, 23 Ch. D. 218 [C. A.]; *Re Jupp, Gladman* v. *Jupp*, 87 L. T. 739; *Re Fraser, Lowther* v. *Fraser*, [1904] 1 Ch. 726.

(*b*) *Ibid.*

(*c*) *Re Bagot, Paton* v. *Ormerod*, [1893] 3 Ch. 348 [C. A.].

A gift of residue will not carry a share thereof which fails (*d*), or even a gift of a particular sum thereout which fails (*e*), unless the portion of the residue so failing is expressly directed to fall back into residue (*f*), or there is a gift over showing an intention on the part of the testator inconsistent with a partial failure of the prior gift (*g*).

A residuary devise of real estate will carry lapsed and void devises (*h*), and a residuary devise of freeholds will carry lapsed and void devises of freehold real estate (*i*).

"Set off" of debt against general legacy.

Where the legatee of a general legacy or of a share of the residue is also a debtor to the estate, it is obvious that until the debt is paid, a portion of the general personal estate applicable for the payment of general legacies being in the hands of the debtor legatee, the residue is not a completely constituted fund. In such cases, in order that the legatees of the residue or of the remaining shares thereof may not be subjected to the risk of losing the outstanding portion of the fund, it is a rule that the debtor must bring his debt into account of the general fund before he will be entitled to claim thereout his legacy or share of residue (*k*).

Principle of "set off."

The right of the executor, in such cases, to defer payment of the legacy is frequently referred to as a right of "retainer" or of "set off"; but the use of either of these expressions may lead to confusion (*l*).

(*d*) *Cresswell* v. *Cheslyn*, 2 Eden, 123; *Skrymsher* v. *Northcote*, 1 Swans. 566, 570; *Sykes* v. *Sykes*, L. R. 3 Ch. App. 301.

(*e*) *Skrymsher* v. *Northcote*, *supra*; *Green* v. *Pertwee*, 5 Hare, 249.

(*f*) *Re Palmer*, *Palmer* v. *Answorth*, [1893] 3 Ch. 369 [C. A.]; *Re Allan*, *Dow* v. *Cassaigne*, [1903] 1 Ch. 276 [C. A.].

(*g*) *Re Parker*, *Stephenson* v. *Parker*, [1901] 1 Ch. 408.

(*h*) 7 Will. 4 & 1 Vict. c. 26, s. 25.

(*i*) *Mason* v. *Ogden*, [1903] A. C. 1.

(*k*) *Cherry* v. *Boultbee*, 4 My. & C. 442; *Courtenay* v. *Williams*, 15 L. J. Ch. 204; *Re Knapman*, *Knapman* v. *Wreford*, 18 Ch. D. 300 [C. A.]; *Re Akerman*, *Akerman* v. *Akerman*, [1891] 3 Ch. 212; *Re Taylor*, *Taylor* v. *Wade*, [1894] 1 Ch. 671.

(*l*) *Per* Lord COTTENHAM, in *Cherry* v. *Boultbee*, 4 My. & C. 447; *per* KEKEWICH, J., in *Re Akerman*, *Akerman* v. *Akerman*, [1891] 3 Ch. 219.

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The principle upon which the doctrine rests is explained by KEKEWICH, J., in *Re Akerman, Akerman* v. *Akerman* (*m*), as follows: "A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing is, in truth, retained by the representative of the estate; nothing is, in strict language, set off; but the contributor is paid by holding in his own hand a part of the mass, which, if the mass were completed, he would receive back."

Application of doctrine.

Consistently with the above statement it would seem that the doctrine is applicable only where the property which is the subject of the gift is assets for the payment of general legacies. Thus, as a general rule, there is no right of "retainer" or "set off" in respect of a debt owing to the estate from a specific legatee of chattels or leaseholds or a devisee (*n*); nor from a person entitled to a legacy, to meet which a fund has been appropriated and so withdrawn from the general personal estate (*o*). But in a recent case it was held that an executor might properly "retain" or "set off" a debt due from a specific legatee of a share of a partnership (*p*).

In cases not falling within the Married Women's Property Act, 1882 (*q*), the right of an executor to "retain" or "set off" a debt owing from the husband of the legatee, is subject to the wife's prior equity to a settlement out of the legacy (*r*).

The rule applies although the legacy has been assigned (*s*), and although the debt in respect of

(*m*) [1891] 3 Ch. 212, 219.
(*n*) *Re Akerman, supra*; *Re Taylor, supra.*
(*o*) *Ballard* v. *Marsden*, 14 Ch. D. 374.
(*p*) *Re Taylor, supra.* (*q*) 45 & 46 Vict. c. 75.
(*r*) *Re Briant, Poulter* v. *Shackel*, 39 Ch. D. 471.
(*s*) *Re Batchelor, Sloper* v. *Oliver*, L. R. 16 Eq. 481; *Re Knapman, Knapman* v. *Wreford*, 18 Ch. D. 300 [C. A.].

which the right of "retainer" or "set off" is exercised, is statute barred (*t*); but does not apply if the debt is not presently enforceable (*u*), and is not, therefore, applicable as against a married woman in respect of advances which, having no separate estate, she is under no legal obligation to repay (*x*).

The bankruptcy of the legatee after the death of the testator, does not affect the executor's right of "retainer" or "set off" (*y*), but it is otherwise if the bankruptcy occur prior to the death (*z*).

"Set off" against distributive share under intestacy.

It should be observed that the doctrine in question is also applicable to the case of a beneficiary debtor to the estate claiming a distributive share of the estate under an intestacy (*a*).

SECTION II.

OF ABATEMENT.

Failure of residue.

Where the general personal estate proves insufficient, after payment of debts, for the payment of all the general pecuniary legacies, and the latter are not expressly or impliedly charged upon any other part of the testator's estate, it follows from what has already been said that a gift of the residue of the testator's personal estate will fail completely (*b*), and the general pecuniary legacies will be subject to abatement (*c*).

(*t*) *Re Cordwell's Estate*, L. R. 20 Eq. 644; *Re Akerman, supra.*

(*u*) *Re Rees, Rees* v. *Rees*, 60 L. T. 260; *Re Binns, Lee* v. *Binns*, [1896] 2 Ch. 584.

(*x*) *Re Wheeler, Hankinson* v. *Hayter*, [1904] 2 Ch. 66.

(*y*) *Re Watson, Turner* v. *Watson*, [1896] 1 Ch. 925.

(*z*) *Cherry* v. *Boultbee*, 4 My. & C. 442; *Re Hodgson, Hodgson* v. *Fox*, 9 Ch. D. 673.

(*a*) *Taylor* v. *Taylor*, L. R. 20 Eq. 155; *Re Cordwell's Estate*, L. R. 20 Eq. 644; *Re Jones, Christmas* v. *Jones*, [1897] 2 Ch. 190, 201.

(*b*) *Re Lyne's Estate, Sands* v. *Lyne*, L. R. 8 Eq. 482; *De Lisle* v. *Hodges*, L. R. 17 Eq. 440.

(*c*) *Harley* v. *Moon*, 1 Drew. & Sm. 623; *De Lisle* v. *Hodges, supra*; *Baker* v. *Farmer*, L. R. 3 Ch. App. 537, 542.

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Rule as to abatement.

The general rule as to the abatement of general legacies is that they must abate in equal proportions among themselves (*d*). A gift of an annuity being a general legacy (*e*) must, of course, abate in proportion with the other general legacies. In such case the annuity must be valued and a proportionate sum deducted therefrom by way of abatement (*f*).

Demonstrative legacy.

Demonstrative legacies, for the payment of which a particular fund has been provided by the testator, are an exception to the rule, except so far as the fund provided is insufficient for their payment (*g*).

Specific legacy.

Specific legacies, not forming part of the testator's general estate, and not therefore being assets for the payment of general legacies, cannot, as a general rule, be called upon to abate with general legacies (*h*); but even specific legacies may be liable to abatement along with general legacies if the intention of the testator clearly appears that they are to be subject, together with the general personal estate, to the payment of general legacies (*i*).

Where a specific legacy is directed to be sold, and the proceeds to be applied in payment of several legacies of given amounts, if the sale realises less than the aggregate amount of the legacies given, the legatees must take subject to abatement among themselves (*k*).

Rule that all general legacies abate

The rule that upon the general personal estate proving insufficient for the payment of general pecuniary

(*d*) 2 Fonbl. (5th ed.), 374; 2 Bla. Com. (10th ed.), p. 512. See *Auther* v. *Auther*, 13 Sim. 422, 440; *Re Wilkins*, *Wilkins* v. *Rotherham*, 27 Ch. D. 703.

(*e*) *Ante*, p. 297.

(*f*) *Wroughton* v. *Colquhoun*, 1 De G. & Sm. 357; *Long* v. *Hughes*, *ibid.* 364 n; *Re Sinclair*, *Allen* v. *Sinclair*, [1897] 1 Ch. 921; *Re Ross*, *Ashton* v. *Ross*, [1900] 1 Ch. 162; *Re Metcalfe*, *Metcalfe* v. *Blencowe*, [1903] 2 Ch. 424.

(*g*) *Mullins* v. *Smith*, 1 Drew. & Sm. 204; *Roberts* v. *Pocock*, 4 Ves. 150.

(*h*) *Clifton* v. *Burt*, 1 P. Wms. 679; *Mullins* v. *Smith*, 1 Drew. & Sm. 204.

(*i*) *Sayer* v. *Sayer*, Pr. Ch. 392.

(*k*) *Page* v. *Leapingwell*, 18 Ves. 463; *Re Tunno*, *Raikes* v. *Raikes*, 45 Ch. D. 66. *Cf. Re Grainger*, *Dawson* v. *Higgins*, [1900] 2 Ch. 756, 776.

legacies, the latter must all abate in equal proportions among themselves, is subject, of course, to any direction to the contrary contained in the will. Thus, where a testator having two sons and a daughter bequeathed to them £2,000 a-piece subject to a proviso that if his assets should fall short for the payment of all three legacies, still the daughter should be paid her full share, and that the abatement should be borne proportionably out of the sons' legacies only, it was held that the words and meaning of the will must take effect (*l*).

rateably, controlled by intention.

An intention that particular general legacies given by the will are not to be subject to abatement with the rest of the general legacies, may also be gathered from the will as a whole (*m*). It is, however, well settled that near relationship to the testator does not of itself give a legatee any priority over other legatees (*n*). It is also a well established rule that a mere direction to pay a legacy immediately, or within one month or within three months after a testator's decease, is no evidence of any intention on the part of the testator to give priority to that particular legacy in case of a deficiency in the estate, because it is to be presumed that the testator intended all the legacies to be paid in full when he gave them (*o*). The *onus* is upon those who contend for a priority to show that the testator meant to give a preference to a particular legatee (*p*).

Evidence of intention.

An apparent exception to the rule of rateable abatement among general legacies is to be found in the

Apparent exception to rule.

(*l*) *Marsh* v. *Evans*, 1 P. Wms. 668.

(*m*) See *Brown* v. *Brown*, 1 Keen, 275, and cases there cited. See also *Att.-Gen.* v. *Robins*, 2 P. Wms. 23; *Re Malone*, *Browne* v. *Malone*, [1897] 1 Ir. R. 571.

(*n*) *Miller* v. *Huddlestone*, 3 Macn. & G. 513; *Re Schweder's Estate*, *Oppenheim* v. *Schweder*, [1891] 3 Ch. 44.

(*o*) *Blower* v. *Morret*, 2 Ves. 420; *Miller* v. *Huddlestone*, *supra*; *Re Schweder's Estate*. *Oppenheim* v. *Schweder*, *supra*. But see *contra*, *Re Hardy*, *Wells* v. *Borwick*, 17 Ch. D. 798.

(*p*) *Brown* v. *Brown*, *supra*, at p. 277. See *Ashley* v. *Pocock*, 3 Atk. 208.

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preference given to so-called legacies to purchasers. A legacy, that is to say, to a creditor in satisfaction of a debt due to him from the testator (*q*), and to a widow in satisfaction of her dower, may be entitled to priority over other general legacies (*r*); but inasmuch as a legacy is essentially a gift taking effect of the bounty of the testator (*s*), it is difficult to assign any other reason for such priority than an implied intention on the part of the testator in that behalf.

Where, in a recent case, a testator gave to the trustees of his daughters' marriage settlement £3,000 in satisfaction of his covenant to pay them £1,000, it was held that the principle by which a legacy given in satisfaction of dower was entitled to priority and did not abate, was inapplicable to the case of a legacy given in satisfaction of an ascertained debt, and, therefore, that the legacy of £3,000 being a mere bounty was liable to abatement (*ss*).

Legacy in satisfaction of dower.

Claims to preference upon the above ground were formerly of frequent occurrence in cases of bequests to widows in satisfaction of dower. The rule was that where a legacy was bequeathed to the widow in satisfaction of her right to dower, she was regarded as a purchaser of the legacy, and if she elected to take the legacy in lieu of the dower, the legacy had priority over other legacies if the personal estate proved insufficient

(*q*) The general rule as regards the satisfaction of debts by legacies is that a legacy to a creditor of an amount equal to or greater than the debt is *primâ facie* to be considered as satisfaction of the debt (*Re Rattenberry, Ray* v. *Grant*, [1906] 1 Ch. 667). See *Farrer* v. *Park*, 3 Ch. D. 309; *Re Fletcher, Gillings* v. *Fletcher*, 38 Ch. D. 373; *Re Horlock, Calham* v. *Smith*, [1895] 1 Ch. 516; *Re Roberts, Roberts* v. *Parry*, 50 W. R. 469.

(*r*) See *Re Lawley, Zaiser* v. *Lawley*, [1902] 2 Ch. 673, at p. 678; *per* COZENS-HARDY, L.J., in *S. C.*, [1902] 2 Ch. 799, at pp. 807, 808.

(*s*) *Ante*, pp. 259, 294.

(*ss*) *Re Wedmore, Wedmore* v. *Wedmore*, [1907] 2 Ch. 277. It should be observed that the observations of JOYCE, J., and COZENS-HARDY, L.J., in *Re Lawley, supra*, were not cited in this case, and that KEKEWICH, J., prefaces his judgment with the remark that no authority had been produced to him really bearing upon the point.

for payment of all the legacies in full (*t*); and this, notwithstanding that the legacy was greatly in excess of the amount of any dower to which she might be entitled (*u*).

By s. 12 of the Dower Act, 1833 (*x*), it is enacted that—

> "Nothing in this Act contained shall interfere with any rule of equity, or of any Ecclesiastical Court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies."

Notwithstanding the above section, it will not often happen, at the present day, that a widow will be entitled to claim as purchaser a legacy bequeathed to her in satisfaction of dower; for whether her right to dower has become barred under the provisions of the above Act during the lifetime of her husband, or by a declaration against dower, or a devise of real estate to her contained in her husband's will, the effect in each case will be the same, namely, to remove the ground of her claim as purchaser in respect of any legacy bequeathed to her, although the legacy be expressly given "in satisfaction of dower" (*y*).

(*t*) *Burridge* v. *Bradyl*, 1 P. Wms. 127; *Blower* v. *Morret*, 2 Ves. 420; *Davenhill* v. *Fletcher*, Amb. 244; *Heath* v. *Dendy*, 1 Russ. 543.

(*u*) *Roper* v. *Roper*, 3 Ch. D. 714, 717.

(*x*) 3 & 4 Will. 4, c. 105.

(*y*) *Re Greenwood*, *Greenwood* v. *Greenwood*, [1892] 2 Ch. 295. See as to the circumstances under which such a claim might still be made, *ibid.*, at p. 300.

CHAPTER XV.

OF INTESTACY.

Distribution of personal estate prescribed by statute.

THE manner in which the personal representative is required to distribute the undisposed of personal estate of a deceased person (save only where a wife dies leaving her husband surviving) is mainly prescribed by the statute 22 & 23 Car. 2, c. 10, commonly called the Statute of Distributions, as amended by the Intestates' Estates Act, 1890 (*a*).

Former title of administrator to undisposed of residue.

Prior to the above statute, an administrator was entitled at law, after the payment of debts, to the whole of the residue of the personal estate committed to his charge. Although the ordinary, before the statute, took bonds from the administrator to make distribution, those bonds were at law adjudged void, and the administrator entitled to all the personal estate. The Statute of Distributions, however, takes away the administrator's pretensions (which he before had made with success) of retaining the whole (*b*).

Primâ facie title of executor to undisposed of residue.

In like manner an executor, by virtue of his appointment as executor, which operates as a testamentary disposition of the whole of the testator's personal estate (*c*), was in all cases, prior to the statute below mentioned, *primâ facie* entitled beneficially as well as at law to the undisposed of residue of his testator's estate after payment of the testator's debts and due performance of the provisions of his will (*d*).

(*a*) 53 & 54 Vict. c. 29.
(*b*) *Edwards* v. *Freeman*, 2 P. Wms. 448.
(*c*) *Ante*, p. 28.
(*d*) Toller (7th ed.), p. 351.

Right of next-of-kin or Crown as against executor.

If, however, it appeared on the face of the will either expressly or, in the absence of admissible evidence to the contrary (*e*), by sufficient implication, that the testator intended to confer only the office of executor and not the beneficial interest in the residue, the executor was held to be a trustee for the statutory next-of-kin, if any (*f*), and, if none, for the Crown, whose right then accrued to the property as *bonâ vacantia*, *i.e.*, property which has no other owner (*g*); but the burden was on the next-of-kin or the Crown, as the case might be, to establish that the executor did not take beneficially (*h*).

What expressions were sufficient for the purpose of displacing the *primâ facie* title of the executor as against the next-of-kin it is now unnecessary to discuss, inasmuch as nearly seventy years have now elapsed since the Act 11 Geo. 4 & 1 Will. 4, c. 40, was passed, whereby it was enacted as follows:

After September 1st, 1830, executors deemed to be trustees of residue undisposed of for persons entitled under the Statute of Distributions, unless, etc.

Section 1. "When any person shall die after the first day of September next after the passing of this Act, having by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by Courts of Equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially."

Not to affect rights of executors where there is not any person

Section 2. "Provided also, that nothing herein contained shall affect or prejudice any right to which any executor, if this Act had not been passed, would have been entitled, in cases where there is not any person

(*e*) *Clennell* v. *Lewthwaite*, 2 Ves. jun. 474. See Toller (7th ed.), p. 354.

(*f*) *Fowler* v. *Garlike*, 1 Russ. & M. 232; *Lynn* v. *Beaver*, Turn. & R. 63, 68; *Morice* v. *Bishop of Durham*, 10 Ves. 535. See Toller (7th ed.), pp. 351—354.

(*g*) See *Re Barnett's Trusts*, [1902] 1 Ch. 847, at p. 857.

(*h*) *Re Glukman*, *Att.-Gen.* v. *Jefferys*, [1907] 1 Ch. 171.

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entitled to the residue under the statute.

who would be entitled to the testator's estate under the Statute of Distributions, in respect of any residue not expressly disposed of."

Object of above enactment.

The object of this enactment was to invert the onus of proof in cases of contest between the executor and next-of-kin, and to throw upon the executor the necessity of showing that the testator intended him to take beneficially (*i*).

Parol evidence of intention no longer admissible.

It may be observed that since any intention that the executor shall take beneficially must, by virtue of the above Act, appear by the will or codicil, parol evidence is no longer admissible in such cases to show such intention (*k*).

Absolute gift to executor.

Also that the enactment has no application to the case of an express bequest to executors in terms importing an absolute gift to them (*l*).

Where no statutory next-of-kin, former rule still applies.

Where there are no statutory next-of-kin, the title of the executor as against the Crown is covered by the old law, that is to say, *primâ facie* the executor will take the residue for his own benefit as against the Crown, but not so if there is clear indication of the testator's intention to give only the office of executor without any beneficial interest (*m*); and the burden is on the Crown to establish that the executor does not take beneficially.

Contrary intention inferred from gift of pecuniary legacy.

An intention on the part of a testator to displace his executor's *primâ facie* title to undisposed of residue as against the Crown will be inferred from the gift of a

(*i*) *Williams* v. *Arkle*, L. R. 7 H. L. 606, 630. See *Re Roby*, *Howlett* v. *Newington*, [1907] 2 Ch. 84.

(*k*) *Love* v. *Gaze*, 8 Beav. 472.

(*l*) *Williams* v. *Arkle*, *supra*; *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C., p. 388.

(*m*) *Hawkins* v. *Hawkins*, 7 Sim. 173; *Taylor* v. *Haygarth*, 14 Sim. 8; *Re Knowles*, 28 W. R. 975; *Re Bacon's Will*, *Camp* v. *Coe*, 31 Ch. D. 460.

pecuniary legacy to a sole executor or of equal pecuniary legacies to all the executors. "It is clear law," observes SWINFEN EADY, J., in *Re Glukman, Att.-Gen.* v. *Jeffreys* (*n*), "that if only one executor be appointed, and a pecuniary legacy be given to him, he will not take the residue beneficially, the reason being—as stated by Sir R. P. ARDEN, M.R., in *Dicks* v. *Lambert* (*o*)—that 'a gift of part to an executor bars him from the whole.' The same rule applies if several executors be appointed, and pecuniary legacies of equal amount be given to each. The principle is that where executors are intended to take the whole residue beneficially, no reason exists for giving a part to them equally. On the other hand, it is not sufficient to rebut the presumption that the executors are intended to take the residue beneficially, if, when several executors are appointed, pecuniary legacies of unequal amounts are given to them." But the presumption was held to be rebutted in the case referred to, where equal pecuniary legacies were given to all the executors, notwithstanding that specific legacies were also given to some only of them.

Of persons claiming as relatives, the undisposed of personal estate of a person dying totally or partially intestate, the right of the husband to the undisposed of personal estate of his wife is first to be considered.

Title of husband to property of wife not settled to her separate use.

A husband being exclusively entitled to take out letters of administration to his wife (*p*), his right as administrator to the beneficial enjoyment of her personal property of course followed (*q*). The Statute of Distributions while altering the law, in this respect, as regards administrators generally, contained expressions which raised a doubt whether it had not also altered

(*n*) [1907] 1 Ch. 171. The judgment in this case contains a careful review of the earlier authorities on the subject.

(*o*) 4 Ves. 731.

(*p*) *Ante*, p. 40.

(*q*) *Supra*, p. 338.

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the law as regards the husband. That doubt was set at rest by a clause introduced into the Statute of Frauds (*r*), which enacted that neither the Statute of Distributions nor anything therein contained—

> "shall be construed to extend to the estates of femecoverts that shall die intestate, but that their husbands may demand and have administration of their rights credits and other personal estates and recover and enjoy the same as they might have done before the making of the said Act."

The operation of this clause of the Statute of Frauds is not confined to the life of the husband, or to the circumstance of his having reduced any part of the wife's personal estate into possession; the clause provides that no part of her estate shall be distributable amongst her relations after her death (*s*).

So where a wife died possessed of *choses in action*, and the husband survived, and died without taking out letters of administration to his wife, and afterwards the next-of-kin of the wife administered to her estate, it was held that the administrator of the wife was but a trustee for the executor of the husband (*t*).

In the words of LINDLEY, L.J., in *Smart* v. *Tranter* (*u*), "there is now no doubt as regards the *choses in action* of the wife not reduced into possession during the coverture, that if the husband survives, he is beneficially entitled to them. If he takes out letters of administration, he is entitled to them at law and in equity; but if he does not take out letters of administration, the legal personal representative of the wife is the person to get them in, but having got them in, holds them in trust for the husband." There is nothing, therefore, in the altered practice of the Probate

(*r*) 29 Car. 2, c. 3, s. 24.

(*s*) *Squib* v. *Wyn*, 1 P. Wms. 378.

(*t*) *Carl* v. *Rees*, cited *ibid.* 381. See *Humphrey* v. *Bullen*, 1 Atk. 458; *Elliott* v. *Collier*, 3 Atk. 526.

(*u*) 43 Ch. D., at p. 596.

Division of granting probate in general terms to the executors of the wife's will (*x*), which in any way affects the husband's beneficial interest in the undisposed of personal estate of his wife (*y*).

Upon the death of the wife intestate, her chattel interests in possession are said to vest in her husband *juri mariti*, without the necessity of any grant of administration (*z*).

Right of wife to dispose by will of personal property with the assent of her husband.

A married woman cannot make a will of property which is neither her statutory separate property nor property settled to her separate use unless she has some power of disposition over it which she can exercise without the consent of her husband. As to all property vested in the husband in his marital right, he may, however, if he pleases, waive his right, and so waive it as to give effect to a will made by his wife during the coverture in derogation of his marital right (*a*). In other words, the husband may assent to the disposition by will of such property by his wife, and such assent may be given either in the lifetime of his wife or after her death; in the former case it remains revocable during her life, in the latter case, once given, it is irrevocable (*b*).

Right of wife to dispose by will of separate property.

The power of a married woman to dispose by will of personalty which is her separate property, has long been recognised as an incident to her separate estate (*c*); and by s. 1 of the Married Women's Property Act (*d*), is made incident to her statutory separate property under that Act.

(*x*) *Ante*, p. 41.

(*y*) *Smart* v. *Tranter*, 43 Ch. D. 589 [C. A.]. See *Elliot* v. *North*, [1901] 1 Ch. 424.

(*z*) *Surman* v. *Wharton*, [1891] 1 Q. B. 491.

(*a*) *Noble* v. *Willock*, L. R. 8 Ch. App. 778, 790.

(*b*) *Ibid.*; *Re Atkinson, Waller* v. *Atkinson*, [1899] 2 Ch. 1 [C. A.]; *Elliot* v. *North*, *supra*.

(*c*) *Fettiplace* v. *Gorges*, 1 Ves. jun. 46.

(*d*) 45 & 46 Vict. c. 75.

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Title of husband to separate property undisposed of.

But although a married woman is thus enabled to bequeath her separate estate away from her husband, the beneficial interest in the undisposed of personal property of a deceased wife, still devolves as formerly upon her husband, notwithstanding that it is subject to a trust for her separate use (*e*), or is separate property by virtue of the Married Women's Property Act, 1882 (*f*). So far as the property is undisposed of, the quality of separate property ceases on the wife's death, and, consequently, the right of the husband accrues just as if the separate use had never existed (*g*).

Right of wife to undisposed of personal estate of husband.

Under Intestates' Estates Act, 1890.

Next as to the rights of a wife in the distribution of the personal estate of her deceased husband.

By the Intestates Estates Act, 1890 (*h*), it is in effect enacted that where the intestate dies leaving a widow but no issue, and his real and personal estates do not, at the date of his death (*i*), exceed £500 in value, such estates shall belong to the widow absolutely and exclusively (*j*). Where the estates exceed £500, the widow is to be entitled to £500 out of it, and to have a charge for the amount on the estates with interest at 4 per cent. per annum from the testator's death (*k*); and such charge is to be borne between the realty and the personalty in their respective values (*l*). This statutory provision in favour of the widow is to be in addition to her share of the residue of the real and personal estates of the intestate remaining after payment of the sum of £500, as if such residue had been the whole of the intestate's real and personal estates, and this Act had not been passed (*m*).

(*e*) *Proudley* v. *Fielder*, 2 My. & K. 57; *Molney* v. *Kennedy*, 10 Sim. 254; *Cooper* v. *Macdonald*, 7 Ch. D. 296.
(*f*) *Re Lambert's Estate*, *Stanton* v. *Lambert*, 39 Ch. D. 626.
(*g*) *Ibid.*, at p. 633.
(*h*) 53 & 54 Vict. c. 29.
(*i*) *Re Heath*, *Heath* v. *Widgeon*, [1907] 2 Ch. 270.
(*j*) Section 1.
(*k*) Section 2.
(*l*) Section 3.
(*m*) Section 4.

The remaining sections of the Act prescribe the mode of valuation to be adopted in respect of real and personal estates respectively (*n*).

Act does not apply to partial intestacy.

It has been held that the above provisions of the Intestates' Estates Act, 1890, do not apply (as do those of the Statute of Distributions) to cases of partial intestacy (*o*).

Under Statute of Distributions.

Apart from the provision for the widow made by the above Act of 1890, she is entitled under the Statute of Distributions to share in the residuary personal estate, according to the following rules:

Where issue living.

1. If the husband dies leaving a widow and any child or children, or descendant of any child, the widow takes one equal third part of the residue (*p*).

Where no issue.

2. If the testator leaves a widow but no child nor descendant of any child the widow takes a moiety (*q*). And although there are no persons entitled as statutory next-of-kin to the other moiety the widow will still take only a moiety, and the other moiety will go to the Crown (*r*).

Waiver.

The wife's third share or moiety under the statute may be effectually waived by a covenant to that effect contained in her marriage settlement (*s*).

Rights of issue of deceased.

Next, as to the rights of issue of the intestate: Children or their descendants are entitled, under the Statute of Distributions (subject to the provision for hotchpot contained in the concluding clause of s. 5 thereof), to share in the residuary personal estate according to the following rules:

Where widow and children living.

1. If the intestate leaves a widow and any children or child such issue will take two-thirds of the residue, and if more than one, equally (*t*).

(*n*) Sections 5, 6.
(*o*) *Re Twigg's Estate, Twigg* v. *Black*, [1892] 1 Ch. 579.
(*p*) 22 & 23 Car. 2, c. 10, s. 5 (Rev. Stat., s. 3).
(*q*) 22 & 23 Car. 2, c. 10, s. 6 (Rev. Stat., s. 3).
(*r*) *Cave* v. *Roberts*, 8 Sim. 214.
(*s*) *Gurley* v. *Gurley*, 8 Cl. & F. 743.
(*t*) 22 & 23 Car. 2, c. 10, s. 5 (Rev. Stat., s. 3).

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Where children *or* other issue, but no widow.

2. If the intestate leaves children or a child or the descendant of any child, but no widow, the issue will take between them the whole of the residue (*u*).

Where children *and* other issue.

3. If the intestate dies leaving children or a child and the descendants of some or one of them who have died in his lifetime, such issue will take two-thirds or the whole of the residue (according as the intestate did or did not leave a widow) in equal shares *per stirpes* and not *per capita*, the remoter issue taking between them the share to which their deceased parent would have been entitled if living (*v*).

Where remote issue, but no children.

4. If the intestate dies leaving no child surviving him, but leaving the issue of children or a child who died in his lifetime, such remoter issue will take between them two-thirds or the whole of the residue (according as the intestate did or did not leave a widow) in equal shares, such remoter issue if of equal degree taking between themselves *per capita;* but the children of any of such issue who are dead take between them only the share to which their deceased parent would have been entitled if living (*x*).

Statutory rule as to hotchpot.

The above rules for the division of the undisposed of residue of the personal estate of a deceased parent among children or the descendants of children, are subject, if the deceased parent were the father (*y*), and if he died totally intestate (*z*), to the provision for hotchpot contained in the concluding paragraph of s. 5 of the Statute of Distributions, which provides, in effect, that no child of the intestate (except his heir-at-law), on whom he settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive

(*u*) Section 7 (Rev. Stat., s. 4).

(*v*) Section 5 (Rev. Stat., s. 3). See Toller (7th ed.), p. 374.

(*x*) Section 5 (Rev. Stat., s. 3); *Re Ross's Trust*, L. R. 13 Eq. 286; *Re Natt*, *Walker* v. *Gammage*, 37 Ch. D. 517. See *contra*, Toller (7th ed.), p. 374.

(*y*) *Holt* v. *Frederick*, 2 P. Wms. 357.

(*z*) *Infra*.

shares of the other children, shall participate with them in the surplus; but if the estate so given him by way of advancement, be not equivalent to their shares, then that such part of the surplus as will make it so, shall be allotted to him (*a*).

"The intention of making the provisions of the children equal goes throughout the whole Act. . . . The Act takes it into consideration that there may be some of the children who have received a portion or advancement before, but not so much as to make up their full share; in that case such child so advanced but in part shall have so much more out of the intestate's personal estate as will suffice to make his share equal to that of the other children" (*b*).

Statutory rule applies to actual intestacy only.

The statutory provision for hotchpot applies in cases of actual intestacy, but not otherwise (*c*). The mere existence of a will which has become wholly inoperative by reason of the death of the sole legatee and executor therein named in the lifetime of the testator is not sufficient to prevent the statutory provision from applying (*d*), but it has been said that where there is an executor and consequently a complete will, though the executor may be declared a trustee for the persons entitled under the Statute of Distributions, the latter take as if the residue had been actually given to them; and that a child, advanced by his father in his lifetime, could not, in such a case, be called on, by force of the statute, to bring his share into hotchpot (*e*).

(*a*) 2 Bla. Com. (10th ed.), p. 516.

(*b*) *Per* RAYMOND, L.C.J., in *Edwards* v. *Freeman*, 2 P. Wms., at p. 443.

(*c*) *Vachell* v. *Jeffereys*, Pr. Ch. 170; *Cowper* v. *Scott*, 3 P. Wms. 119; *Wilkinson* v. *Atkinson*, Turn. & R. 255; *Re Roby*, *Howlett* v. *Newington*, [1907] 2 Ch. 84. See as to the meaning of actual intestacy, *ante*, p. 4.

(*d*) *Harte* v. *Meredith*, 13 Ir. R. Ch. 341; *Re Ford*, *Ford* v. *Ford*, [1902] 2 Ch. 605.

(*e*) *Walton* v. *Walton*, 14 Ves. 318; *Stewart* v. *Stewart*, 15 Ch. D. 539, 543. But see the observations of BUCKLEY, J., upon this dictum in *Re Ford*, *Ford* v. *Ford*, [1902] 1 Ch. 218. See as to ademption of shares of residue bequeathed by will among children, *ante*, pp. 314—320.

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"The statute takes nothing away that has been given to any of the children; however unequal that may have been, how much soever that may exceed the remainder of the personal estate left by the intestate at his death, the child may, if he pleases, keep it all; if he be not contented, but would have more, then he must bring into hotchpot what he has before received; this manifestly seems to be the intention of the Act, grounded upon the most just rule of equity, '*equality*'" (*f*).

Where a child dies leaving issue and having received advances from his father in his lifetime, the issue standing in the place and stead of their father (*g*), and claiming under him, cannot be in a better position than their father would have been if he had lived to claim a distributive share, but are bound by the hotchpot provisions of s. 5 which provides for descendants, and, accordingly, must bring into hotchpot their parent's advances (*h*).

Exception in favour of heir-at-law.

The heir-at-law is entitled to share in the distribution irrespectively of land coming to him by descent or otherwise, and this although he be the youngest son succeeding under the custom of Borough English (*i*); but in respect of advancements received by the heir-at-law from his father in the latter's lifetime, out of the personal estate, he must account in the same manner as the other children (*k*).

Advancement within rule.

Many benefits may be conferred by a father upon his child, which will not be held advancements by way

(*f*) *Per* RAYMOND, L.C.J., in *Edwards* v. *Freeman*, 2 P. Wms., at p. 443.

(*g*) See *ante*, p. 346.

(*h*) *Proud* v. *Turner*, 2 P. Wms. 560. See *Re Gist, Gist* v. *Timbrill*, [1906] 1 Ch. 58.

(*i*) *Lutwyche* v. *Lutwyche*, Cas. *t.* Talb. 276; *Re Lyons, Lyons* v. *Lyons*, [1903] 1 I. R. 156.

(*k*) Com. Dig. (5th ed.) Adm. H. 4; Burn's Eccl. Law, 344; Fitz-G. 285; *Re Lyons, supra.*

of portion within the meaning of s. 5 of the statute (*l*). Small inconsiderable sums of money given to a child by the father, or mere trivial presents he may make to the child, as of a gold watch or wedding clothes, will not be deemed an advancement; nor will money expended by the father for his maintenance, nor given to bind him an apprentice, nor laid out in his education at school, at the university, or on his travels (*m*).

So the instalments of an annuity paid by a father in his lifetime to his daughters in pursuance of a covenant contained in a deed of separation from his wife, were held not to be advancements (*n*).

Essentials of advancement.

An advancement by way of portion was said by Sir GEORGE JESSEL, in *Taylor* v. *Taylor* (*o*), to be "something given by the parent to establish the child in life, or to make what is called a provision for him—not a mere casual payment." Such a provision may be made by way of marriage portion on the marriage of the child; it may also be made upon placing the child in a profession or business, as by paying for a commission (*p*) or buying the goodwill of a business and giving the stock-in-trade. But whatever the occasion of the gift, it must be made with a view to the establishment of the child in life (*q*). Upon this view of the statute, it was held in the case above mentioned, that entry money at the Middle Temple was for the establishment of the child and must be accounted for; but that a payment to a special pleader was rather in the nature of a payment for preliminary education, and need not be accounted for; that money paid as the price of a

(*l*) *Taylor* v. *Taylor*, L. R. 20 Eq. 155, 158.
(*m*) Toller (7th ed.), p. 380. See 3 P. Wms. 317 n.
(*n*) *Hatfeild* v. *Minet*, 8 Ch. D. 136 [C. A.].
(*o*) L. R. 20 Eq. 155, 157.
(*p*) *Andrew* v. *Andrew*, 30 L. T. 457.
(*q*) *Taylor* v. *Taylor*, *supra*. See *Hatfeild* v. *Minet*, *supra*.

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commission in the army and outfit, was an advancement which must be accounted for, but not the price of an outfit for India or passage money to India; and that certain sums paid for debts were in the nature merely of temporary assistance, and need not be accounted for. In a recent case (*r*), the payment of a sum of £1,500 made by a father to his son for the purpose of discharging part of a mortgage debt owing by the latter, was held to be in the nature of temporary assistance only, and not an advancement by way of portion.

Presumption in case of large payment.

Where a large sum is given by a father to his son in one payment, there is a presumption that it is intended to start him in life or make a provision for him; but if a small sum is so given, evidence may be required to show the purpose (*s*).

Future contingent provision.

A future contingent provision in a settlement, if made to take effect within a reasonable time, as at a certain age or marriage, will be held to be an advancement *pro tanto* (*t*).

Rights of relatives of deceased other than issue.

Lastly as to the rights of relatives not being descendants of the intestate.

If the intestate leaves no children nor decendants of any child, the residuary personal estate, or, subject to the provisions of the Intestates' Estates Act, 1890, a moiety of it, if the intestate leaves a widow, is distributable according to the state of the family as follows:

Father living.

1. If the father be living, he will be entitled to the exclusion of other relatives (*u*).

(*r*) *Re Scott, Langton* v. *Scott*, [1903] 1 Ch. 1 [C. A.], adopting the view expressed by JESSEL, M.R., in *Taylor* v. *Taylor*, *supra*, in preference to that of WOOD, V.-C., in *Boyd* v. *Boyd*, L. R. 4 Eq. 305, and PEARSON, J., in *Re Blockley, Blockley* v. *Blockley*, 29 Ch. D. 250, 252. See *Re Gist, Gist* v. *Timbrill*, [1906] 1 Ch. 58, at p. 62.

(*s*) *Taylor* v. *Taylor*, *supra*, at p. 158.

(*t*) *Edwards* v. *Freeman*, 2 P. Wms. 435, 449. See the earlier cases on the subject collected and fully discussed, Toller (7th ed.), pp. 376—381.

(*u*) *Blackborough* v. *Davis*, 1 P. Wms. 41, 51.

Mother and all brothers and sisters living, but father dead.

2. If the father be dead, but the mother and all the brothers and sisters are living, the mother, brothers and sisters will be entitled in equal shares (*x*), whether the latter are of the half or the whole blood (*y*).

Mother, brother, or sister also dead—no nephew or niece.

3. If, in addition to the father, the mother or any brother or sister be dead (and there be no child of any deceased brother or sister living), the survivors of the mother, brothers, and sisters, will be entitled in equal shares, and if only one have survived, he or she will be entitled absolutely (*z*).

Same—nephew or niece living.

4. If, in the same circumstances, there be living a child or children of a deceased brother or sister, such child or children will be entitled, *per stirpes*, in the distribution, to the share which the parent, if living, would have taken, provided the mother (*a*), or any brother or sister (*b*) be living.

The right to claim by representation under the Statute of Distributions is strictly confined to the children of deceased brothers and sisters, *i.e.*, nephews and nieces of the intestate (*c*). The sole ground upon which such a claim can be supported, is that, had the parent survived, a distribution in shares must have been rendered necessary. In other words, there must be a share to which representation can be claimed. If neither mother nor any brother nor sister have survived, there is no one, as it is said, to draw up the children of a deceased brother or sister to a representation to their parent, for, in such case, had the parent survived, he or she would have taken the whole and not a share (*d*).

(*x*) 1 Jac. 2, c. 17, s. 7; *Keylway* v. *Keylway*, 2 P. Wms. 344.

(*y*) *Burnet* v. *Mann*, 1 Ves. 156; *Jessop* v. *Watson*, 1 My. & K. 665.

(*z*) *Jackson* v. *Prudehome*, 11 Vin. Abr. 196, tit. Exors. (Z.) 12, n.

(*a*) *Walsh* v. *Walsh*, Eq. Ca. Abr., vol. i., 249; Pr. Ch. 54; *Lloyd* v. *Tench*, 2 Ves. 215; *Davers* v. *Dewes*, 3 P. Wms. 40, 50.

(*b*) *Stanley* v. *Stanley*, 1 Atk. 455.

(*c*) *Pett* v. *Pett*, 1 Salk. 250; *Stanley* v. *Stanley*, *supra*.

(*d*) *Lloyd* v. *Tench*, *supra*; *Durant* v. *Prestwood*, 1 Atk. 454.

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Though only taking a share as legally representing their parent, nephews and nieces are not bound by any bargain made by their parent with the deceased by virtue of which the parent, had he survived, would have been entitled to something less than his full aliquot share (*e*).

Since the mother, if living, claims equally under the Statute of James II., before referred to, with brothers and sisters, it was held in *Stanley* v. *Stanley* (*f*), that the survival of the mother, no less than the survival of a brother or sister, will suffice to ground a claim of children of a deceased brother or sister to take by representation. The narrower statement of the rule in *Lloyd* v. *Tench* (*g*), as "that if no brother or sister be living, representation in *loco parentis* is at an end," must apparently, therefore, be taken to have been made in reference to the facts of that particular case, in which there was no mother living.

If no mother, brother or sister have survived so as to bring up the children of a deceased brother or sister to a representation to their parent, such children will be left to claim as next-of-kin only, in competition with other next-of-kin of the same, namely, the third, degree (*h*).

Where father, mother, brothers, and sisters dead, right of next-of-kin.

5. If there is neither father, mother, brother, nor sister, the personal estate will be distributable among the next-of-kin, namely, the relative standing in nearest degree of consanguinity to the intestate, and if more than one, in equal shares *per capita* (*i*). No right of representation is allowed to the issue of any such relatives (*k*).

(*e*) *Re Gist*, *Gist* v. *Timbrill*, [1906] 1 Ch. 58.
(*f*) 1 Atk. 455.
(*g*) 2 Ves. 215.
(*h*) See *infra*, p. 355.
(*i*) 2 Bla. Com. (10th ed.), p. 515; Burn's Eccl. Law, 404; Com. Dig. (5th ed.) Adm. H. See *Blackborough* v. *Davis*, 1 P. Wms. 41.
(*k*) 22 & 23 Car. 2, c. 10, s. 7 (Rev. Stat., s. 4); Toller (7th ed.), p. 383. See *Bowers* v. *Littlewood*, 1 P. Wms. 594; *Maw* v. *Harding*, 2 Vern. 233.

Definition of consanguinity.

In order to determine the degree of consanguinity or nearness of kin in which relatives by blood stand to the intestate, it must be explained that consanguinity or kindred (defined as *vinculum personarum ab eodem stipite descendentium*, the connection or relations of persons descended from the same stock or common ancestor) is either lineal or collateral (*l*).

Lineal relationship.

Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between J. S. and his father, grandfather, and great-grandfather, and so upwards in the ascending line; or between J. S. and his son, grandson, and great-grandson, and so downwards in the direct descending line. Every generation in this lineal direct consanguinity constitutes a different degree, reckoning either upwards or downwards. The father of J. S. is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and, therefore, universally obtains as well in the civil and canon as in the common law (*m*).

Collateral relationship.

Collateral relations agree with the lineal in this, that they descend from the same stock or ancestor, but differ in this, that they do not descend the one from the other. Collateral kinsmen are, then, such as lineally spring from one and the same ancestor, who is the *stirps* or root, the *stipes* or common stock, from which these relations are branched out. As if J. S. have two sons who have each issue; both of these issues are lineally descended from J. S. as their common ancestor, and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and

(*l*) 2 Bla. Com. (10th ed.), p. 203.
(*m*) *Ibid.*

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all have a portion of his blood in their veins, which denominates them *consanguineos* (*n*).

The mode of calculating the degrees in the collateral line is not that of the canonists adopted in the descent of real estates at common law, but conforms to that of the civilians (*o*), and is as follows: to count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending; or, in other words, to take the sum of the degrees in both lines to the common ancestor (*p*).

Consanguinity—males reckoned with females, whole with half-blood.

In reckoning the degree of relationship in the manner above described, no preference is to be given to males over females, nor to the paternal over the maternal line (*q*), nor to the whole over the half-blood (*r*). Thus relatives by the father's side and the mother's in equal degree of kindred, are equally entitled; and relatives of the half-blood must be admitted to share with relatives of equal degree of the whole blood, for they are the kindred of the intestate and excluded from inheritances of real estate only on feudal reasons (*s*).

Relationship by marriage.

Affinity or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property; as, if A. have a son and a daughter who both die, the son leaving a wife, and the daughter a husband: on A.'s dying afterwards intestate, such husband and wife have neither of them any claim on his estate (*t*).

(*n*) 2 Bla. Com. (10th ed.), p. 204.

(*o*) *Mentney* v. *Petty*, Pr. Ch. 593; 2 Bla. Com. (10th ed.), p. 504.

(*p*) Toller (7th ed.), p. 88.

(*q*) *Blackborough* v. *Davis*, 1 P. Wms. 41, 53.

(*r*) *Winchelsea* v. *Norcliffe*, 1 Vern. 435, 437; *Blackborough* v. *Davis*, *supra*.

(*s*) 2 Bla. Com. (10th ed.), p. 505.

(*t*) Toller (7th ed.), p. 385.

No right of representation among next-of-kin.

Among next-of-kin, proximity of blood affords the only ground upon which a relative can claim to share in the distribution of the intestate's personal estate (*u*).

As has been seen (*x*), nephews and nieces are entitled if the mother or any brother or sister be living, to claim by way of representation, instead of as next-of-kin. When, however, mother, brothers, and sisters are all dead, nephews and nieces can only claim as next-of-kin (*y*), and as such, can stand in no better position than any other relatives of equal, namely, the third, degree (*z*). They must therefore take, if at all, *per capita*, either among themselves, or with other relatives of equal degree, as the case may be.

Thus, if an intestate leave a deceased brother's only son, and ten children of a deceased half-sister, the ten children of the deceased half-sister will take ten parts in eleven with the son of the deceased brother (*a*).

So, again, if the intestate leave two aunts, and a nephew and a niece, the property distributable must be divided into four equal parts, of which the aunts, the nephew and niece will each take one (*b*).

Summary of persons entitled as next-of-kin.

The order in which relatives of the intestate are entitled *as next-of-kin* to share in the distribution of his personal estate may be conveniently summarised as follows: Grandfathers and grandmothers, being of the second degree, are first entitled (*c*); next, relatives of the third degree, namely, great-grandfathers and great-grandmothers, uncles and aunts and nephews and

(*u*) Toller (7th ed.), p. 383.

(*x*) *Supra*, p. 351.

(*y*) *Davers* v. *Dewes*, 3 P. Wms. 40, 50.

(*z*) *Lloyd* v. *Tench*, 2 Ves. 212, 215.

(*a*) *Bowers* v. *Littlewood*, 1 P. Wms. 595. See *Davers* v. *Dewes*, *supra*.

(*b*) *Durant* v. *Prestwood*, 1 Atk. 454.

(*c*) *Blackborough* v. *Davis*, 1 P. Wms. 41, 51; *Woodroff* v. *Wickworth*, Pr. Ch. 527, 593; Eq. Ca. Abr. 249.

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nieces (*d*); next, relatives of the fourth degree, namely, great-great-grandfathers, and great-great-grandmothers, great-uncles and great-aunts, first cousins and children of nephews and nieces; next, relatives of the fifth degree are entitled, and so on.

Proof of kinship.

Letters of administration granted to a person as next-of-kin of the deceased, are conclusive proof, until revoked, of the kinship of such person (*e*).

Distributive share payable at expiration of year from death.

It is further provided by the Statute of Distributions (*f*), that no distribution of the goods of any person dying intestate shall be made till after one year be fully expired after the intestate's death, and that in case debts of the intestate shall appear, after distribution has been made, each beneficiary shall refund a rateable part out of the share allotted to him, for the purpose of paying the same.

Distributive share vested at death.

Notwithstanding the above provision, where a person entitled to a distributive share dies within a year after the intestate, the share of such person will be a vested interest, transmissible to his executors or administrators, for, in a sense, the statute makes a will for the intestate and the distributive share is for this purpose to be treated as if it were a legacy made payable a year from the testator's death (*g*).

Death of bastard intestate.

If a bastard, who, being *nullius filius*, has no kindred, or anyone else that has no kindred, dies intestate and without wife (*h*) or child, it was formerly held that the ordinary might seise his goods and dispose of them

(*d*) *Mentney* v. *Petty*, Pr. Ch. 593; *Lloyd* v. *Tench*, 2 Ves. 213.

(*e*) *Re Ivory*, *Hankin* v. *Turner*, 10 Ch. D. 372 [C. A.].

(*f*) Section 8 (Rev. Stat., s. 5).

(*g*) *Jackson* v. *Prudehome*, 11 Vin. Abr. 196, tit. Exors. (Z.) 12; *Davers* v. *Dewes*, 3 P. Wms. 40, at p. 49 n.; *Cooper* v. *Cooper*, L. R. 7 H. L. 53.

(*h*) *Cave* v. *Roberts*, 8 Sim. 214.

in pois usus (*i*). But the usual course now, although the King is entitled to the property as *bona vacantia* by virtue of his prerogative (*k*), is for some one to procure letters patent, or other authority from the King, and thus to become entitled to a grant of administration and to the sole enjoyment of the property.

Customs of London and York.

Customary modes of distribution peculiar to the city of London, the province of York, and certain other places having known and received customs, though expressly recognised by the Statute of Distributions (*l*), are now altogether abolished (*m*).

Persons beneficially entitled to real estate.

All real estate in respect of which a deceased owner dies intestate and which devolves, by virtue of s. 1 of the Land Transfer Act, 1897 (*n*), upon the personal representative, is required by that Act to be held by him, subject to the payment of debts and liabilities, as trustee for the persons by law beneficially entitled thereto (*o*).

The persons immediately entitled must apparently be either the devisee or devisees of the deceased owner, if he died testate (*p*), or his heir-at-law if he died intestate (*q*), subject in the latter case to any right to dower on the part of his widow and to the right of the Crown claiming by escheat (*r*).

It seems perfectly clear that no part of the undisposed of real estate of a deceased person is intended

(*i*) 2 Bla. Com. (10th ed.), p. 505; *Jones* v. *Goodchild*, 3 P. Wms. 33.

(*k*) *Taylor* v. *Haygarth*, 14 Sim. 8. See *Re Barnett's Trusts*, [1902] 1 Ch. 847.

(*l*) Section 4 (Rev. Stat., s. 2).

(*m*) 19 & 20 Vict. c. 94.

(*n*) 60 & 61 Vict. c. 65. See *ante*, pp. 71 *et seq.*

(*o*) Section 2 (1).

(*p*) See *ante*, pp. 61 *et seq.*

(*q*) See *ante*, pp. 56 *et seq.*

(*r*) 47 & 48 Vict. c. 71. See *Re Wood, Att.-Gen.* v. *Anderson*, [1896] 2 Ch. 596; *Re Bond, Panes* v. *Att.-Gen.*, 82 L. T. 612.

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by the Act to be made distributable among the statutory next-of-kin. It is true that by s. 2 (3) of the Act, real estate is to be administered "with the same incidents as if it were personal estate," but, as there has already been occasion to explain (*s*), the incidents referred to must be taken to be incidents of procedure, and not of substantive law relating to beneficial interests.

(*s*) *Ante*, p. 328.

CHAPTER XVI.

OF THE ORDER OF APPLICATION OF ASSETS IN PAYMENT OF DEBTS.

SECTION I.

Of the Incidence of Unsecured Debts, Funeral, and Testamentary Expenses.

Personal estate the primary fund.

The personal estate of a deceased person is the natural and primary fund for the payment of his debts (*a*); and although by the common law a creditor by specialty in which the heir was expressly bound might, at his option, recover judgment for his debt either against the personal representative or the heir (*b*), it was always considered that the liability of the heir was auxiliary only to the primary liability of the personal estate of the deceased (*c*). By parity of reasoning the primary liability of the personal estate to pay all debts is not affected by the statute 3 & 4 Will. 4, c. 104, by which all hereditaments are made assets for the payment of all kinds of debts (*d*).

Debts naturally incident to particular property.

The above remarks do not, however, apply to any liability to which a particular fund forming part of the deceased's estate is naturally incident, and which arises after the death of the deceased. Any such liability must be borne by the fund out of which it arises (*e*).

(*a*) *Walker* v. *Jackson*, 2 Atk. 624; *Howel* v. *Price*, 1 P. Wms. 291.
(*b*) *Galton* v. *Hancock*, 2 Atk. 424, 426.
(*c*) *Clifton* v. *Burt*, 1 P. Wms. 680.
(*d*) Williams' Real Assets, p. 27.
(*e*) *Armstrong* v. *Burnet*, 20 Beav. 424, 432; *Bothamley* v. *Sherson*, L. R. 20 Eq. 304, 316.

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Thus a fine incident to the preservation of a lease which becomes due after the deceased's death must be borne by the person taking the benefit of the lease (*f*). So also must damages for breach of covenants contained in the lease, unless, of course, arising in respect of covenants broken in the deceased's lifetime, in which case they are primarily payable as any other debt out of the general personal estate (*g*). Calls upon shares of which the deceased died possessed, made subsequently to his death, are in like manner primarily payable out of the shares in respect of which they are made (*h*).

Foundation and limits of rule as to primary liability of personalty.

The rule establishing the personal estate of the deceased the primary fund for the payment of his debts is founded on the presumed intention of the deceased, and will not, of course, be allowed to interfere with the exercise by the deceased of a free power of testamentary disposition. If the deceased should have died intestate without having made a will, the rule becomes absolute; but if he should have made a will and an intention can be gathered therefrom to vary or exclude the rule, effect will be given to such intention.

Rule does not prejudice creditors.

It should here be observed, that although it is within the power of the testator to dispose of his property, whether real or personal, in such a manner as to throw the burden of his debts primarily upon any portion he thinks fit, yet no testamentary disposition will bind creditors (*i*). The creditors of the deceased are entitled to immediate payment, and cannot be compelled to wait until the testator's scheme is worked out (*k*), or until

(*f*) *Fitzwilliams* v. *Kelly*, 10 Hare, 266, 277.

(*g*) *Harris* v. *Poyner*, 1 Drew. 174; *Barry* v. *Harding*, 1 Jo. & Lat. 475, 490.

(*h*) *Armstrong* v. *Burnet*, 20 Beav. 424, 437; *Addams* v. *Ferick*, 26 Beav. 384.

(*i*) *Walker* v. *Jackson*, 2 Atk. 624.

(*k*) *Coxe* v. *Basset*, 3 Ves. 155, 164; *Allan* v. *Gott*, L. R. 7 Ch. App. 439, 442.

the money required to satisfy their claims can be raised by dealing with the property which he has appropriated for that purpose. The rights and remedies of a creditor are paramount to those of beneficiaries under the testator's will, and cannot be excluded or prejudiced by any testamentary disposition (*l*). Should the executor be obliged to resort, for the purpose of paying debts, to property which, as between beneficiaries is not primarily liable for their payment, the rights of the beneficiaries thus disturbed must be set straight by means of the process of marshalling to be presently considered.

Qualifications of rule stated.

The result is, that as between beneficiaries the ultimate incidence or burden of unsecured debts, funeral, and testamentary expenses, is upon the personal estate of the deceased to the exoneration of his real estate, unless he, by his will, exempt it or any part of it by express words or manifest intention by a declaration plain or necessary inference tantamount to express words (*m*).

Dispositions made without reference to debts.

The exemption of personal estate from its primary liability may be effected by dispositions made either with or without express reference to the payment of debts. With regard, first, to the latter. If a testator bequeaths specifically any portion of his personal estate he will be deemed to have indicated a "manifest intention" to withdraw the subject-matter of the bequest from its primary liability in common with the rest of the personalty towards the payment of his debts (*n*); and, similarly, the bequest of a general pecuniary legacy is deemed to be an indication of

(*l*) See *per* Lord LINDLEY, in *Beyfus* v. *Lawley*, [1903] A. C. 411, 413.

(*m*) *Walker* v. *Jackson*, 2 Atk. 624; *Ancaster* v. *Mayer*, 1 Bro. C. C. 454; *Webb* v. *Jones*, 2 Bro. C. C. 60; *Greene* v. *Greene*, 4 Madd. 148; *Milnes* v. *Slater*, 8 Ves. 295, 305; *Tower* v. *Rous*, 18 Ves. 132; *Bootle* v. *Blundell*, 19 Ves. 494, 517.

(*n*) See *M'Cleland* v. *Shaw*, 2 Sch. & Lef. 538, 544, and cases cited *infra*, p. 369, n. (*z*).

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intention to withdraw from the personal estate sufficient to satisfy the amount of the bequest (*o*).

Where, therefore, a testatrix, after appointing an executor and executrix of her will, devised her real estate and bequeathed the residue of her personal estate to her executrix, but afterwards signed a memorandum requesting that a specified portion of the residue of her estate should be applied in a particular manner, which memorandum, although not attested as a will, was communicated to the executrix and admitted by her to constitute a valid trust binding upon her, it was held that as between the executrix and the beneficiaries under the memorandum the portion of residue specified in the memorandum must be treated for purposes of administration as property specifically bequeathed, and as liable rateably only with the real estate for any deficiency which there might be after the residuary personal estate not comprised in the memorandum had first been exhausted in payment of debts; although, if the testatrix had by her will made specific or pecuniary bequests, the legatees would have been entitled to say that their rights could not be affected by a document which did not satisfy the requirements of the Wills Act, and to insist that the estate should be administered, so far as they were concerned, without regard to it (*p*).

The fund of personalty remaining after deducting what is specifically bequeathed and so much as is necessary for the payment of general legacies, is termed "general personal estate" for the payment of debts.

Dispositions made in reference to debts.

Secondly, a testator may by express disposition appropriate any particular fund for the payment of his debts, and such fund may consist of either personal or real estate, or of both. In the case of any

(*o*) See cases cited *infra*, p. 369, n. (*x*).

(*p*) *Re Maddock, Llewelyn* v. *Washington*, [1902] 2 Ch. 220 [C. A.].

such disposition the question will arise whether the intention of the testator has been merely to create an auxiliary fund for the payment of debts, or whether an intention is to be inferred that the fund appropriated is to be applied in payment of debts to the exoneration of the general personal estate. It is proposed to discuss briefly the rules of construction respectively applicable to the several cases of the appropriation by will of personalty alone, of realty alone, and of realty and personalty.

Bequest of personalty in trust for payment of debts.

The effect of a bequest of a specific fund of personalty in trust for the payment of debts, is to render that specific fund primarily liable for the payment of debts to the exoneration of the general personal estate, provided the testator has also disposed of his general residuary personal estate (*q*), but not otherwise (*r*).

Devise of realty in trust for payment of debts.

The effect of a devise of real estate charged with or upon trust for the payment of debts, without more, is to render the real estate so devised merely an auxiliary fund for the payment of debts (*s*), and applicable for that purpose after the general personal estate has been exhausted, in the order hereafter mentioned (*t*).

In order to exonerate the personal estate from the payment of debts, "it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts" (*u*).

"The rule is plain that, in order to exonerate the personal estate, you must find not merely words

(*q*) *Browne* v. *Groombridge*, 4 Madd. 495; *Choat* v. *Yeats*, 1 Jac. & W. 102; *Trott* v. *Buchanan*, 28 Ch. D. 446, 456.

(*r*) *Hewett* v. *Snare*, 1 De G. & Sm. 333; *Lomax* v. *Lomax*, 12 Beav. 285; *Newbegin* v. *Bell*, 23 Beav. 386.

(*s*) *Bridgman* v. *Dove*, 3 Atk. 201; *Collis* v. *Robins*, 1 De G. & Sm 131; *Trott* v. *Buchanan*, 28 Ch. D. 446.

(*t*) See *infra*, p. 368.

(*u*) *Per* Lord ELDON, in *Bootle* v. *Blundell*, 1 Mer. 193, 219. See *Rhodes* v. *Rudge*, 1 Sim. 79; *Tait* v. *Lord Northwick*, 4 Ves. 816, 823.

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onerating the real estate, but words exonerating and discharging the personal estate. But it is not necessary that these words should be express. It is enough that the plain and necessary inference from the whole of the will is to create that exoneration" (*x*).

Intention to exonerate personalty—how determined.

In each particular case, as it arises, the question of intention must be gathered from the whole testamentary disposition taken together (*y*). For the purpose of construing any particular will, reported decisions upon the construction of other wills may serve to indicate the sort of provision which will be regarded as of weight upon the question of intention. In any case the construction put upon the provisions of the will must be consonant with the presumption that the testator knew the rule of law, and knew, therefore, that he could not exonerate his personal estate from the burden of his debts, unless he so expressed himself as to lead the Court to the fair conclusion, from the language which he used, that such was the intention which he meant to express (*z*).

Disposition of all the personal estate in addition to charge.

For the purpose of implying an intention on the part of the testator to exonerate the general personal estate, it makes no difference whether the real estate be devised charged with or upon trust for the payment of debts (*a*), for the words which charge the real estate cannot themselves be looked at as exhibiting an intention to exonerate the personal estate (*b*); but where, in addition

(*x*) *Per* FRY, L.J., in *Kilford* v. *Blaney*, 31 Ch. D. 56, 65 [C. A.]. See *Forrest* v. *Prescott*, L. R. 10 Eq. 545.

(*y*) *Bootle* v. *Blundell*, 1 Mer. 220.

(*z*) *Beckham* v. *Cruttwell*, 3 My. & C. 763, 772; *Kilford* v. *Blaney*, *supra*.

(*a*) *M'Cleland* v. *Shaw*, 2 Sch. & Lef. 538, 545. The distinction appears to have been to some extent relied upon by BUCKLEY, J., in *Re Banks*, *Banks* v. *Busbridge*, [1905] 1 Ch. 547, but the attention of the learned judge does not appear to have been directed in that case to the observations of Lord REDESDALE, in *M'Cleland* v. *Shaw*, *supra*.

(*b*) *Kilford* v. *Blaney*, 31 Ch. D. 56, at p. 62 [C. A.].

to a charge or trust of real estate for the payment of debts, the will contains a disposition of all the personal estate, words may be found from an examination of the will as a whole indicating beyond reasonable doubt an intention on the part of the testator that the personalty shall be exonerated, an intention, that is to say, to give the personal estate as a specific bequest (*c*) as distinguished from a gift to the executor or by way of residue (*d*).

Addition to charge of "funeral and testamentary expenses."

The mere fact that the will contains a disposition of all the personal estate and that the real estate is expressly charged with the payment of funeral and testamentary expenses in addition to other debts, has been considered as tending towards the supposition that the personal estate was intended to be exonerated (*e*), but is clearly insufficient in itself to enable the Court to draw the inference that such was the testator's intention (*f*).

No exoneration in favour of lapsed personalty.

Wherever the testator has so appropriated a fund of real or personal estate as to exonerate the general personal estate, the exoneration takes effect only for the purposes of the will, and does not therefore apply to exonerate lapsed personalty. For whether the property appropriated be realty or personalty, the principle is the same, namely, that the right and benefit of the exoneration is in fact part of a legacy which fails (*g*).

(*c*) *Greene* v. *Greene*, 4 Madd. 148; *Michell* v. *Michell*, 5 Madd. 69. See *Lance* v. *Aglionby*, 27 Beav. 65; *Gilbertson* v. *Gilbertson*, 34 Beav. 354; *Kilford* v. *Blaney*, *supra*.

(*d*) *M'Cleland* v. *Shaw*, *supra*; *Tower* v. *Lord Rous*, 18 Ves. 132, 139; *Haslewood* v. *Pope*, 3 P. Wms. 322; *Gilbertson* v. *Gilbertson*, *supra*.

(*e*) *Burton* v. *Knowlton*, 3 Ves. 107; *Bootle* v. *Blundell*, 1 Mer. 193.

(*f*) *Aldridge* v. *Wallscourt*, 1 Ball & B. 312; *Gilbertson* v. *Gilbertson*, 34 Beav. 354; *Kilford* v. *Blaney*, 31 Ch. D. 56 [C. A.]; *Re Banks*, *Banks* v. *Busbridge*, [1905] 1 Ch. 547. See *Brummel* v. *Prothero*, 3 Ves. 111; *Hartley* v. *Hurl*, 5 Ves. 540.

(*g*) *Dacre* v. *Patrickson*, 1 Dr. & Sm. 182; *Kilford* v. *Blaney*, 31 Ch. D. 56, 66 [C. A.]. See *Re Kirk*, *Kirk* v. *Kirk*, 21 Ch. D. 431, at p. 437 [C. A.].

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Devise and bequest of mixed fund for payment of debts.

With regard to the appropriation by the testator of a fund consisting of both real and personal estate, the rule is stated by LEACH, M.R., in the leading case of *Roberts* v. *Walker* (*h*) as follows: "When a testator creates from real estate and personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does in effect direct that the real and personal estates which have been converted into that fund shall answer the stated purposes, and every of them *pro ratâ*, according to their respective values."

Mixed fund for payment of legacies.

The rule, it is to be observed, is equally applicable to the case of a mixed fund created for the payment of legacies and other charges, as to that of a mixed fund created for the payment of debts alone (*i*). In each case the main question to be determined is whether the real estate has been devised in such terms as in fact to constitute with the personal estate, a mixed or blended fund for the payment of the charges specified.

"Mixed fund," how created.

Where, as in *Roberts* v. *Walker* (*k*), the testator gives the whole of his real and personal estate to trustees upon trust to sell and convert the same, and out of the proceeds to arise therefrom to pay his debts, funeral, and testamentary expenses and legacies, a mixed fund will be created.

So, also, where a testator has devised his real estate in trust for sale, and directed that the proceeds of sale shall be considered as part of his personal estate, the real estate so devised will be applicable *pro ratâ* with the personal estate towards the payment of all debts, legacies, and charges to which the latter estate is

(*h*) 1 Russ. & My. 752, 767.
(*i*) *Allan* v. *Gott*, L. R. 7 Ch. App. 439. See *ante* p. 325.
(*k*) 1 Russ. & My. 752.

subject (*l*). In the case of *Kidney* v. *Coussmaker* (*m*), the testator devised real estate to trustees upon trust to sell the same and to invest the proceeds as therein mentioned, and to hold the investments "in trust for such person and persons, in such proportions, and in such manner and form in all respects as I have hereinafter directed of and concerning the residue of my personal estate; it being my intent and meaning that such overplus money shall go with and be considered as part of the residue and surplus of my personal estate." After making certain specific bequests the testator bequeathed "all the rest residue and surplus of my personal estate after payment of my debts, funeral charges, the expenses of proving this my will, the expense of a monument, and legacies aforesaid" to the same trustees in trust as therein mentioned. It was held that this fund consisting of proceeds of real estate and residue of personal estate was a mixed fund.

Where "mixed fund" not created.

But where the form of the disposition is simply a devise and bequest of real and personal estate together, in trust or charged with the payment of debts or legacies, that alone will not constitute a mixed fund, but will render the real estate an auxiliary fund only (*n*). In order to constitute a mixed fund there must, in addition, be either a positive direction for sale (*o*) or, if the rest of the will tends to support the inference that a mixed fund was intended to be created, a discretionary power of sale (*p*).

(*l*) *Kidney* v. *Coussmaker*, 1 Ves. jun. 436; *Bright* v. *Larcher*, 3 De G. & J. 148; *Simmons* v. *Rose*, 6 De G. M. & G. 411.

(*m*) 1 Ves. jun. 436.

(*n*) *Boughton* v. *Boughton*, 1 H. L. Cas. 406; *Tench* v. *Cheese* 6 De G. M. & G. 453; *Allan* v. *Gott*, L. R. 7 Ch. App. 439.

(*o*) *Boughton* v. *Boughton*, *supra*; *Tench* v. *Cheese*, *supra*.

(*p*) *Allan* v. *Gott*, *supra*.

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Surplus of mixed fund—to whom devolving.

Where real estate and personal estate have been constituted a mixed fund for the payment of debts or other charges, and owing to the omission of the testator to dispose of any surplus remaining after payment thereof, or for any other reason, there occurs a partial intestacy, then, so far as the surplus has been composed of real estate, the heir is to have the benefit of it as so much real estate undisposed of, and so far as the surplus has been composed of personal estate, it is personal estate undisposed of for the benefit of the next-of-kin (*q*).

Order of application of assets where no appropriation effected.

In the absence, then, of any direction in the will amounting to an appropriation of a particular fund as the primary fund for the payment of debts, the testator's intention, to be gathered from the several modes of disposition which he may have adopted, will be presumed to be that, as between beneficiaries, his assets are to be applied in payment of unsecured debts in the following order, namely:

(1.) The general personal estate (*r*).

(2.) Real estate devised or directed to be sold to pay debts (*s*).

(3.) Real estate not charged with debts, which, but for the Land Transfer Act, 1897, would descend to the heir (*t*).

(*q*) *Roberts* v. *Walker*, 1 Russ. & My. 752; *Simmons* v. *Rose*, 6 De G. M. & G. 411.

(*r*) *Davies* v. *Topp*, 1 Bro. C. C. 524; 2 Bro. C. C. 259 n.; *Donne* v. *Lewis*, 2 Bro. C. C. 257, 262; *Howel* v. *Price*, 1 P. Wms. 291, 294 n.; *Manning* v. *Spooner*, 3 Ves. 114, 117; *Harmood* v. *Oglander*, 8 Ves. 106, 124.

(*s*) *Galton* v. *Hancock*, 2 Atk. 424; *Powis* v. *Corbet*, 3 Atk. 556; *Manning* v. *Spooner*, *supra*; *Harmood* v. *Oglander*, *supra*; *Milnes* v. *Slater*, 8 Ves. 295, 304; *Phillips* v. *Parry*, 22 Beav. 279; *Stead* v. *Hardaker*, L. R. 15 Eq. 175.

(*t*) *Davies* v. *Topp*, *supra*; *Donne* v. *Lewis*, *supra*; *Chaplin* v. *Chaplin*, 3 P. Wms. 365, 367; *Manning* v. *Spooner*, *supra*; *Harmood* v. *Oglander*, *supra*; *Milnes* v. *Slater*, *supra*; *Scott* v. *Cumberland*, L. R. 18 Eq. 578; *Barber* v. *Wood*, 4 Ch. D. 885.

4.) Real estate charged with debts and devised subject to such a charge (*u*).

(5.) General pecuniary legacies rateably (*x*).

(6.) Real estate devised either specifically or as residue (*y*), and personal estate specifically bequeathed rateably (*z*).

(7.) Real and personal property appointed by will in exercise of a general power of appointment (*a*).

(8.) The paraphernalia of the widow (*b*).

Exception as to appointed property.

The position assigned in the above statement of the order of application of assets to property appointed in exercise of a general power of appointment, is subject to an exception in the case of personal property which, being subject to a general power of appointment, is by virtue of s. 27 of the Wills Act (*c*), included in and passes under a general bequest of personalty. Property so passing must be applied in payment of debts according to the terms of the bequest under which it passes (*d*).

Charge of debts on real estate may

For the purpose of the above order of application an intention on the part of a testator to charge real estate

(*u*) *Aldrich* v. *Cooper*, 8 Ves. 396; *Re Stokes*, *Parsons* v. *Miller*, 67 L. T. 223, and cases there cited; *Re Salt*, *Brothwood* v. *Keeling*, [1895] 2 Ch. 203; *Re Roberts*, *Roberts* v. *Roberts*, [1902] 2 Ch. 834; *Re Kempster*, *Kempster* v. *Kempster*, [1906] 1 Ch. 446.

(*x*) *Clifton* v. *Burt*, 1 P. Wms. 679; *Barton* v. *Cooke*, 5 Ves. 461; *Tomkins* v. *Colthurst*, 1 Ch. D. 626; *Farquharson* v. *Floyer*, 3 Ch. D. 109.

(*y*) *Hensman* v. *Fryer*, L. R. 3 Ch. App. 420; *Jackson* v. *Pease*, L. R. 19 Eq. 96; *Lancefield* v. *Iggulden*, L. R. 10 Ch. App. 136.

(*z*) *Tombs* v. *Roch*, 2 Coll. 490; *Bateman* v. *Hotchkin*, 10 Beav. 426, 431; *Powell* v. *Riley*, L. R. 12 Eq. 175; *Re Maddock*, *Llewelyn* v. *Washington*, [1902] 2 Ch. 220 [C. A.]. See as to proportion in which real estate charged with legacies is liable to contribute with other real and personal estate specifically bequeathed, *Re Saunders-Davies*, *Saunders-Davies* v. *Saunders-Davies*, 34 Ch. D. 482; *Re Bawden*, *National Provincial Bank of England* v. *Cresswell*, [1894] 1 Ch. 693, 703.

(*a*) *Jenny* v. *Andrews*, 6 Madd. 264; *Fleming* v. *Buchanan*, 3 De G. M. & G. 976; *Beyfus* v. *Lawley*, [1903] A. C. 411.

(*b*) *Ridout* v. *Plymouth*, 2 Atk. 104; *Parker* v. *Harvey*, 4 Bro. P. C. 604, 609.

(*c*) 7 Will. 4 & 1 Vict. c. 26.

(*d*) *Williams* v. *Williams*, [1900] 1 Ch. 152.

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be express or implied.

with the payment of his debts may be gathered either from express words of charge contained in the will or from a general direction in the will that his debts shall be paid.

General direction to pay debts.

It appears to be now settled, after much conflict of opinion, that a general direction by the testator that his debts shall be paid, is sufficient to charge his real estate therewith (*e*), even though the only direction to be found be contained in the general introductory words of the will (*f*).

In *Cook* v. *Dawson* (*g*), Lord ROMILLY thus enunciates the rule:

"The authorities further determine, that where the testator gives a general direction that his debts shall be paid, this amounts to a charge of the debts generally on the real estate, at least in all cases where the real estate is afterwards disposed of by the will."

Direction to executor to pay debts.

Where, however, the direction that the debts shall be paid is coupled with a direction that they are to be paid by the executor, it is assumed that the testator meant that the debts should be paid only out of the property which passes to the executor (*h*). It is, accordingly, the rule that where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them (*i*); and the same rule applies

(*e*) *Shallcross* v. *Finden*, 3 Ves. 738; *Graves* v. *Graves*, 8 Sim. 43; *Re Salt, Brothwood* v. *Keeling*, [1895] 2 Ch. 203.

(*f*) *Graves* v. *Graves, supra*, at p. 56; *Clifford* v. *Lewis*, 6 Madd. 33. See *Re Roberts, Roberts* v. *Roberts*, [1902] 2 Ch. 834.

(*g*) 29 Beav. 123, 126.

(*h*) *Cook* v. *Dawson, supra*. See *Powell* v. *Robins*, 7 Ves. 209.

(*i*) *Bailey* v. *Bailey*, 12 Ch. D. 268, 273; *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465, 476; *Re Stokes, Parsons* v. *Miller*, 67 L. T. 223; *Re De Burgh Lawson, De Burgh Lawson* v. *De Burgh Lawson*, 41 Ch. D. 568.

whether the executors take the whole beneficial interest (*k*) or only a life interest (*l*) or no beneficial interest at all (*m*).

Authority to pay debts.

A charge of debts on real estate is not created by a mere authority to pay debts, as by the testator empowering his trustees and executors "to adjust and pay all claims made upon my estate" (*n*).

Order of application not affected by Land Transfer Act, 1897.

The Land Transfer Act, 1897 (*o*), expressly retains in force the rules of law as to the order of application of assets in payment of debts in force at the date thereof, s. 2 (3) thereof providing that nothing therein contained shall alter or affect the order in which real or personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies. Notwithstanding the Act, therefore, pecuniary legatees are still entitled upon a deficiency to have the assets marshalled as against specific devisees of real estate charged with the payment of debts (*p*).

Incidence of funeral and testamentary expenses.

Funeral and testamentary expenses are primarily payable in the same way as other debts out of the general personal estate of the deceased (*q*). But the costs of an administration action, so far as they have been increased by the administration of real estate, must be borne by real estate (*r*); and it makes no difference in this respect that the assets being administered are

(*k*) *Henxell* v. *Whitaker*, 3 Russ. 343.

(*l*) *Finch* v. *Hattersley*, *ibid.* 345 n.

(*m*) *Hartland* v. *Murrell*, 1 Beav. 204.

(*n*) *Re Head's Trustees and Macdonald*, 45 Ch. D. 310 [C. A.].

(*o*) 60 & 61 Vict. c. 65.

(*p*) *Re Kempster*, *Kempster* v. *Kempster*, [1906] 1 Ch. 446. See *ante*, p. 369.

(*q*) *M'Cleland* v. *Shaw*, 2 Sch. & Lef. 534, 544, 548; *Davies* v. *Topp*, 1 Bro. C. C. 524; 2 Bro. C. C. 259 n; *Ripley* v. *Moysey*, 1 Keen, 578; *Trott* v. *Buchanan*, 28 Ch. D. 446.

(*r*) *Patching* v. *Barnett*, [1907] 2 Ch. 154 n.; 51 L. J. Ch. 74 [C. A.]; *Re Middleton*, *Thompson* v. *Harris*, 19 Ch. D. 552 [C. A.].

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those of a person dying after the commencement of the Land Transfer Act, 1897 (*s*).

Meaning of "testamentary expenses."

As in the case of debts owing at the death, a testator may, of course, direct his funeral and testamentary expenses to be discharged out of any particular fund he pleases. A direction in a will to pay "testamentary expenses" includes the costs of an administration suit (*t*), and all expenses incident to the proper performance of the duty of an executor, such as funeral expenses and costs of warehousing specific legacies (*u*). The expression "executorship expenses" bears the same signification (*x*).

SECTION II.

OF THE INCIDENCE OF SECURED DEBTS.

Former rule as to incidence of secured debts.

Prior to the year 1855 (the date of the coming into operation of Locke King's Act (*y*)), the general personal estate of a deceased person was regarded as the primary fund for the payment not only of unsecured debts, funeral and testamentary expenses, but also of all secured debts the creation of which in the deceased's lifetime had benefited his personal estate (*z*); and the order of application of the assets of a deceased testator in the payment of such secured debts was the same as

(*s*) *Re Jones, Elgood* v. *Kinderley*, [1902] 1 Ch. 92; *Re Betts, Doughty* v. *Walker*, [1907] 2 Ch. 149.

(*t*) *Miles* v. *Harrison*, L. R. 9 Ch. App. 316; *Harloe* v. *Harloe*, L. R. 20 Eq. 471; *Sharp* v. *Lush*, 10 Ch. D. 468; *Penny* v. *Penny*, 11 Ch. D. 440. See also *Re Prince, Godwin* v. *Prince*, [1898] 2 Ch. 225.

(*u*) *Sharp* v. *Lush, supra. Cf. Re Brodie, Hood* v. *Hall*, W. N. (1893) 161. As to what death duties a direction to pay "testamentary expenses" includes, see *post*, pp. 382, 383.

(*x*) *Ibid.* See *Re King, Travers* v. *Kelly*, [1904] 1 Ch. 363.

(*y*) 17 & 18 Vict. c. 113.

(*z*) *Ancaster* v. *Mayer*, 1 Bro. C. C. 454, 464, 465.

that adopted, out of regard to the presumed intention of the testator, in the payment of debts generally (*a*).

Extent of claim of heir or devisee to exoneration.

Where, therefore, a person died possessed of real estate which he had mortgaged in his lifetime, his devisee or heir-at-law was, as a rule, entitled to call upon the executor or administrator of the deceased to pay off the mortgage debt out of the general personal estate (*b*), or other assets applicable for the purpose, in exoneration of the mortgaged real estate devised or descended, unless, in the case of a devised estate, it appeared from the will that the testator intended the devisee to take *cum onere* (*c*).

Reference to the table (*d*) giving the order in which assets, unless expressly exempted, are applicable in the payment of the debts of a deceased testator, will show that, in addition to the general personal estate (*e*), the assets applicable for the purpose of exonerating mortgaged real estate, were in the case of a descended mortgaged estate, any real estate devised in trust for the payment of debts; and in the case of a devised mortgaged estate, the following additional funds, namely, lands descended (*f*), and real estate devised charged with the payment of debts (*g*).

Exception where debt not for benefit of personal estate.

It sometimes happened, however, that the circumstances under which the mortgage was made were such as to negative the inference that the debt was

(*a*) See cases cited *infra*.

(*b*) *White* v. *White*, 2 Vern. 43; *Phillips* v. *Phillips*, 2 Bro. C. C. 273.

(*c*) In order to exclude the rule a very clear expression of intention was necessary. See Jarman on Wills (5th ed.), p. 1443; Robbins on Mortgages, pp. 754 *et seq.*

(*d*) *Ante*, p. 368.

(*e*) *Yonge* v. *Furse*, 20 Beav. 380.

(*f*) *Galton* v. *Hancock*, 2 Atk. 424, 430; *Goodwin* v. *Lee*, 1 Kay & J. 377.

(*g*) *Bartholomew* v. *May*, 1 Atk. 487; *Middleton* v. *Middleton*, 15 Beav. 450.

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contracted for the benefit of the general personal estate of the deceased, and in such cases the mortgaged property, and not the general personal estate, was regarded as the primary fund for the payment of the debt.

Thus, where in a settlement made upon the marriage of his daughter, a father covenanted to pay to the trustees of the settlement a sum of money as a marriage portion, and also executed a mortgage to the trustees of the settlement, of part of his estates to secure the payment thereof, it was held that the covenant was merely a matter of form and only auxiliary, and that the charge created no personal debt of the settlor so as to entitle the mortgaged estate to be exonerated out of the settlor's general personal estate (*h*).

Debt not personal to the deceased.

A fortiori where the mortgage debt was never the personal debt of the deceased, but was contracted by the prior owner of the property, the general rule was excluded and the mortgaged property left to bear its own burden.

Thus, where a deceased person died possessed of real estate subject to a mortgage, to which he had become entitled as heir or devisee of the original mortgagor (*i*), or as assignee of the equity of redemption (*k*), the mortgage debt was held primarily payable out of the mortgaged property. But if the deceased owner had in his lifetime adopted the mortgage debt and made it his own the general rule applied and the general personal

(*h*) *Graves* v. *Hicks*, 6 Sim. 391, 398. See *Lechmere* v. *Charlton*, 15 Ves. 193.

(*i*) *Scott* v. *Beecher*, 5 Madd. 96; *Swainson* v. *Swainson*, 6 De G. M. & G. 648.

(*k*) See *Woods* v. *Huntingford*, 3 Ves. 128; *Tweddell* v. *Tweddell*, 2 Bro. C. C. 101, 151.

estate of the deceased was held to be the primary fund for the payment of the debt (*l*).

Former rule still applicable to debts secured upon pure personalty.

Debts secured upon personal estate were subject to the same general rule as debts secured upon real estate, and although under the provisions of Locke King's Act and the amending Acts below mentioned, a different rule is now applicable in the case of mortgages of leaseholds, the incidence of debts secured upon personal estate other than leaseholds is still governed by the former law. Thus, a legatee of a specific legacy of chattels personal or choses in action, subject to a mortgage, is at the present day entitled, in the absence of any contrary intention appearing from the will, to have the mortgage debt discharged out of the general personal estate of the testator (*m*), and if that prove insufficient, then, it would seem to follow, out of all those funds which, in the established order of application of assets, are anterior to personal estate specifically bequeathed (*n*). In a recent case, however, it was held that the legatee of personalty specifically bequeathed subject to a mortgage, was not entitled to have the mortgage debt discharged out of devised real estate, notwithstanding that upon the construction of the will the real estate was charged with the payment of debts (*o*).

Statutory alteration of rule as to debts secured on real and leasehold property.

As regards real and leasehold estate of persons who have died on or since January 1st, 1855, the general rule as to the primary liability of the general personal estate of a deceased mortgagor to payment of the mortgage debt in exoneration of the property comprised in

(*l*) *Townshend* v. *Mostyn*, 26 Beav. 72.

(*m*) *Bothamley* v. *Sherson*, L. R. 20 Eq. 304; *Re Butler, Le Bas* v. *Herbert*, [1894] 3 Ch. 250, 258. See as to charges incident to a chattel, specifically bequeathed, *ante*, p. 359.

(*n*) *Irvin* v. *Ironmonger*, 2 Russ. & My. 531; *Knight* v. *Davis*, 3 My. & K. 358.

(*o*) *Re Butler, Le Bas* v. *Herbert*, *supra*.

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the mortgage, has been abrogated by Locke King's Act (*p*) and the amending Acts (*q*).

By s. 1 of Locke King's Act, it is enacted as follows:

Heir or devisee not to claim payment of mortgage out of personal assets.

"When any person shall after the 31st day of December one thousand eight hundred and fifty-four die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid, or otherwise: Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made, or to be made before the first day of January one thousand eight hundred and fifty five."

Former construction of Locke King's Act.

In consequence of the construction put upon the Act by those cases which decided that the word "mortgage" did not include a vendor's lien (*r*), and that a "contrary or other intention" was sufficiently signified by a gift of residue of real and personal estate or of personal estate, upon trust for, or charged with the

(*p*) 17 & 18 Vict. c. 113.

(*q*) 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34.

(*r*) *Barnewell* v. *Iremonger*, 1 Drew. & Sm. 242, 255; *Hood* v. *Hood*, 26 L. J. Ch. 616.

payment of all the testator's just debts without any express mention of mortgage debts (*s*), the first of the amending Acts (*t*), was passed, which enacted that:

In construing wills, general direction for payment of debts out of personalty not to include mortgage debts, unless intention expressly implied.

Section 1. "In the construction of the will of any person who may die after the thirty-first day of December one thousand eight hundred and sixty-seven, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part (*u*) of his real estate."

Interpretation of word "mortgage."

Section 2. "In the construction of the said Act and of this Act, the word "mortgage" shall be deemed to extend to any lien for unpaid purchase money upon any lands or hereditaments purchased by a testator."

Omissions of first amending Act.

By the last mentioned Act, the operation of Locke King's Act was extended to the case of lands devised subject to a lien for unpaid purchase money, and an express reference to mortgage debts was rendered necessary for the purpose of signifying a contrary intention within the meaning of the principal Act. The amending Act, however, did not in terms include the case of lands descending subject to a vendor's lien (*x*). Mortgaged leaseholds, moreover, were still subject to the former law, whether bequeathed by will or passing upon an intestacy (*y*).

Accordingly, it was enacted by the second of the amending Acts (*z*) above referred to, as follows:

Application of Acts in

Section 1. "The Acts mentioned in the Schedule hereto shall, as to any testator or intestate dying after the

(*s*) *Allen* v. *Allen*, 30 Beav. 395; *Moore* v. *Moore*, 1 De G. J. & S. 602; *Eno* v. *Tatham*, 4 Giff. 181.
(*t*) 30 & 31 Vict. c. 69.
(*u*) See *Re Valpy*, *Valpy* v. *Valpy*, [1906] 1 Ch. 531, *infra*, p. 380.
(*x*) See *Hudson* v. *Cook*, L. R. 13 Eq. 417.
(*y*) *Re Wormsley*, *Hill* v. *Wormsley*, 4 Ch. D. 665.
(*z*) 40 & 41 Vict. c. 34.

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Schedule to lands of any tenure.

thirty-first December one thousand eight hundred and seventy-seven, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase money (*a*); and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate."

Effect of enactments.

Considering these Acts as a whole, it will be seen that their effect is altogether to reverse the former law as to the exoneration of mortgaged real and leasehold estates (*b*). Under these Acts, the incidence of any mortgage, equitable charge, or vendor's lien, is upon the real or leasehold property comprised in such mortgage, charge or lien, unless it can be shown, in the case of any such property devised or bequeathed, that the testator has sufficiently signified an intention to exclude the operation of the Acts. In the case of intestacy the rule is absolute (*c*).

The above Acts operate only as between persons taking through the debtor, and have, therefore, no application where real estate has devolved charged with debts under an entail. In such case, the heir in tail is entitled to have the personal estate of the deceased tenant in tail applied in payment of the charges in exoneration of the real estate (*d*).

(*a*) See *Re Cockcroft*, *Broadbent* v. *Groves*, 24 Ch. D. 94.

(*b*) *Re Kershaw*, *Drake* v. *Kershaw*, 37 Ch. D. 674; *Re Fraser*, *Lowther* v. *Fraser*, [1904] 1 Ch. 726 [C. A.].

(*c*) *Re Fraser*, *Lowther* v. *Fraser*, *supra*.

(*d*) *Re Anthony*, *Anthony* v. *Anthony*, [1893] 3 Ch. 498.

The effect of the Acts is not to impose any personal liability in respect of any mortgage debt, upon the person succeeding either by will or under an intestacy, to property which has devolved subject thereto (*e*). A devisee under a collective devise of lands separately incumbered, or of which part is incumbered and part is free from incumbrances, is, nevertheless, not entitled in case of one of the securities or the only security, as the case may be, proving deficient, to have the deficiency made up out of the personal estate of the testator; but the aggregate charges are thrown by the Act upon the aggregate lands devised in exoneration of the personal estate (*f*).

General charge by will.

A general charge by will on real estate is not a mortgage within the meaning of the Acts, until the amount of the charge has been definitely ascertained (*g*), but specific charges of almost every description are within the scope of the Acts, and intended to be dealt with (*h*).

Rule where debt secured on real and personal estate.

Subject to any special agreement in the mortgage deed or direction in the will (*i*), where real and personal estate are comprised in the same mortgage, the real estate is not primarily liable to the payment of the whole debt, but the mortgage debt must, as between the heir or devisees of the realty and the personal representatives of the mortgagor, be borne rateably by the real and personal estate subject thereto (*k*).

(*e*) *Syer* v. *Gladstone*, 30 Ch. D. 614, 616.

(*f*) *Re Baron Kensington, Earl of Longford* v. *Baron Kensington*, [1902] 1 Ch. 203.

(*g*) *Hepworth* v. *Hill*, 30 Beav. 476.

(*h*) See *Re Anthony, Anthony* v. *Anthony*, [1892] 1 Ch. 450; *Re Kidd, Brooman* v. *Withall*, [1894] 3 Ch. 558.

(*i*) *Re Athill, Athill* v. *Athill*, 16 Ch. D. 211 [C. A.]; *Re Dunlop, Dunlop* v. *Dunlop*, 21 Ch. D. 583, 588.

(*k*) *Lipscomb* v. *Lipscomb*, L. R. 7 Eq. 501; *Trestrail* v. *Mason*, 7 Ch. D. 655; *Leonino* v. *Leonino*, 10 Ch. D. 460.

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Debt secured on distinct real estates.

So where separate real estates are comprised in the same mortgage, each estate must be charged proportionably with the mortgage debt (*l*).

Contrary intention within Locke King's Acts.

With regard to "contrary intention" within the meaning of the Acts, it has been held that, just as it is provided (*m*) that a direction that the debts, or all the debts, of the testator shall be paid out of his personal estate, shall not be a sufficient declaration of contrary intention, so, a general direction to pay debts out of real estate or out of a mixed estate of realty and personalty does not evince a contrary intention within the meaning of the Acts (*n*).

So the mere fact that a portion of the real estate subject to a mortgage is specifically devised either absolutely (*o*) or for a life interest (*p*), is insufficient to show a contrary intention within the meaning of the Acts.

It is not, however, necessary in order to evince a contrary intention, that the testator should have referred expressly to his "mortgage debts." All that is required is that the debt shall be specifically described and identified in some way. Where, therefore, a testator who had deposited the title deeds of his real estate with his bankers to secure an overdrawn trade account, by his will divided all his debts into two classes, namely, private debts and trade debts, and after specifically devising all his real estate, bequeathed the residue of his estate subject to the payment of his trade debts, it was held that a contrary

(*l*) *De Rochefort* v. *Dawes*, L. R. 12 Eq. 540; *Re Newmarch, Newmarch* v. *Storr*, 9 Ch. D. 12 [C. A.].

(*m*) *Ante*, p. 377.

(*n*) *Re Newmarch, Newmarch* v. *Storr, supra*; *Elliott* v. *Dearsley*, 16 Ch. D. 322 [C. A.]. See *Re Rossiter, Rossiter* v. *Rossiter*, 15 Ch. D. 355.

(*o*) *Re Smith, Hannington* v. *True*, 33 Ch. D. 195.

(*p*) *Sackville* v. *Smyth*, L. R. 17 Eq. 153.

intention was sufficiently shown, and that the devisee was entitled to have the real estate exonerated from the banker's lien (*q*). Similarly, a direction to pay debts "except mortgage debts, if any, on Blackacre" out of residue, has been held sufficient to imply a contrary intention in respect of debts charged by way of mortgage on other real estate (*r*).

SECTION III.

OF THE INCIDENCE OF DEATH DUTIES.

Estate duty.

For the purpose of determining the incidence of estate duty it is necessary to distinguish between estate duty payable in respect of property which "passes to the executor as such," which the personal representative is required to pay and for which he is made accountable by ss. 6 (2) and 8 (3) respectively of the Finance Act, 1894 (*s*), on the one hand, and estate duty payable in respect of property which "does not pass to the executor as such," which the personal representative is empowered to pay upon request or otherwise and for which he is not made accountable under those sections, but for which other persons are made accountable by s. 8 (4) of the same Act.

Duty attributable to property which passes to executor as such.

The rateable part of the estate duty in proportion to the value of the property which passes to the executor as such, is the present substitute for the old probate duty, which, according to the regular practice, was paid out of the general residuary personal estate. "It was a testamentary expense which had to be incurred by the executor in order to obtain a valid probate which was the evidence of his title, and the burden of it did

(*q*) *Re Fleck, Colston* v. *Roberts*, 37 Ch. D. 677. See *Re Campbell, Campbell* v. *Campbell*, [1893] 2 Ch. 206.

(*r*) *Re Valpy, Valpy* v. *Valpy*, [1906] 1 Ch. 531.

(*s*) 57 & 58 Vict. c. 30.

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not fall upon the specific legatees, and still less upon the specific devisees" (*t*).

It has accordingly been held that the proportionate part of estate duty attributable to property which passes to the executor as such is payable, unless a specific fund is provided by the will out of which such duty is directed to be paid, out of the general residuary estate (*u*).

Included in expression "testamentary expenses."

Being a part of the estate duty, the payment of which by the executor is a necessary incident to the obtaining of a grant of probate, it has been held to be included in the expression "testamentary expenses" where funeral and testamentary expenses and debts are directed to be paid out of a particular fund (*x*).

Duty attributable to property which does not pass to executor as such.

The rateable part of the estate duty on an estate in proportion to the value of any property which does not pass to the executor as such, is made a first charge on the property in respect of which duty is leviable (*y*). It is a part of the estate duty which the executor is not bound to pay, and for which he is not accountable "as such"; it is not, therefore, analogous to probate duty, but to succession duty, and must ultimately be borne by the persons beneficially entitled to the property in respect of which it is payable (*z*), unless directed to be paid out of some other fund provided for the purpose (*a*).

(*t*) *Per* STIRLING, J., in *Re Bourne, Martin* v. *Martin*, [1893] 1 Ch. 188, 191. See *Re King, Travers* v. *Kelly*, [1904] 1 Ch. 363, 367.

(*u*) *Re Webber, Gribble* v. *Webber*, [1896] 1 Ch. 914; *Re Culverhouse, Cook* v. *Culverhouse*, [1896] 2 Ch. 251. See *Re Fearnsides, Baines* v. *Chadwick*, [1903] 1 Ch. 250, 255, and cases cited *post*, p. 384.

(*x*) *Re Clemow, Yeo* v. *Clemow*, [1900] 2 Ch. 182; *Re Fearnsides, Baines* v. *Chadwick, supra*, at p. 250. See *Re Treasure, Wild* v. *Stanham*, [1900] 2 Ch. 648.

(*y*) 57 & 58 Vict. c. 30, s. 9 (1).

(*z*) *Re Countess of Orford, Cartwright* v. *Duc del Balzo*, [1896] 1 Ch. 257; *Berry* v. *Gaukroger*, [1903] 2 Ch. 116, at pp. 131, 132 [C. A.]. See *Re Hacket, Hacket* v. *Gardiner*, [1907] 1 Ch. 385.

(*a*) *Re Pimm, Sharpe* v. *Hodgson*, [1904] 2 Ch. 345.

Not included in expression "testamentary expenses."

The proportionate part of estate duty attributable to property which does not "pass to the executor as such," being analogous to succession duty and not being required to be paid as a condition of obtaining probate, is not a "testamentary expense," and is not, therefore, thrown upon residue by a direction in the will to pay thereout "all my just debts, funeral and testamentary expenses" (*b*); but a direction to pay out of residue, "debts, funeral and testamentary expenses and duties" will have the effect of exonerating specifically devised real estate in respect of which estate duty is payable (*c*).

Real estate does not "pass to executor as such" by virtue of Land Transfer Act, 1897.

It has been held (*d*) that the language of s. 9 (1) of the Finance Act, 1894 (*e*), must be construed with reference to the law as it stood at the time that Act was passed, and not in accordance with the provisions of the Land Transfer Act, 1897 (*f*), and that "property which does not pass to the executor as such" within the meaning of that sub-section will still include real estate devolving by virtue of the last-mentioned Act upon the personal representative of the deceased owner. The incidence of estate duty remains, therefore, as before the passing of that Act.

Property appointed under general power whether passing to executor "as such."

Considerable difference of opinion has arisen upon the question whether property appointed under a general power of appointment vests in the executor "as such" within the meaning of s. 9 (1) of the Finance Act, 1894. From what has already been said it will be seen that upon the determination of this question depends the further question whether the rateable part of the estate duty payable upon, and in respect of,

(*b*) *Re Sharman, Wright* v. *Sharman*, [1901] 2 Ch. 280; *Re Dixon, Penfold* v. *Dixon*, [1902] 1 Ch. 248.

(*c*) *Re Pimm, Sharpe* v. *Hodgson*, [1904] 2 Ch. 345.

(*d*) *Re Palmer, Palmer* v. *Rose-Innes*, [1900] W. N. 9; *Re Sharman, Wright* v. *Sharman, supra.*

(*e*) 57 & 58 Vict. c. 30.

(*f*) 60 & 61 Vict. c. 65.

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the appointed property must, in the absence of express direction, be borne by the appointee or be payable out of residue. In the present state of the authorities, it must suffice here to refer the reader to the conflicting decisions upon the question (*g*), and to draw attention to the instructive judgment of SWINFEN EADY, J., in *Re Fearnsides, Baines* v. *Chadwick* (*h*).

Apportionment of duty.

By s. 14 (1) of the Finance Act, 1894 (*i*), it is enacted as regards apportionment of estate duty as follows:

> "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who, being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property, (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary."

The above sub-section contemplates "that in all cases coming within it, if the executor or person who has to pay the duty, the trustee or whoever he may be (*k*), has paid the duty before handing over a share or sum of money, then he may charge against the person to whom he is handing over the money, or recover from him, if necessary, the amount required for the duty" (*l*).

Where, in a recent case, the owner in fee of real estate died having, by his marriage settlement, charged his real estate with the payment after his death of a sum of money to be held on the trusts thereof, and after-

(*g*) *Re Treasure, Wild* v. *Stanham*, [1900] 2 Ch. 648; *Re Moore, Moore* v. *Moore*, [1901] 1 Ch. 691; *Re Maddock, Llewelyn* v. *Washington*, [1901] 1 Ch. 372; *Re Power*, [1901] 2 Ch. 659; *Re Dixon, Penfold* v. *Dixon*, [1902] 1 Ch. 248; *Re Fearnsides, Baines* v. *Chadwick*, [1903] 1 Ch. 250; *Re Dodson*, [1907] 1 Ch. 284.

(*h*) [1903] 1 Ch. 250.

(*i*) 57 & 58 Vict. c. 30.

(*k*) *Ante*, pp. 245 *et seq.*

(*l*) *Per* NORTH, J., in *Re Countess of Orford, Cartwright* v. *Duc del Balzo*, [1896] 1 Ch. 257. *Cf. Wade* v. *Wade*, [1898] 2 Ch. 276.

wards by his will devised the same real estate in strict settlement, it was held that the above sub-section applied, and that his executor, having paid estate duty in respect of the whole of the real and personal estate of the testator, was entitled to recover from the trustees of the marriage settlement an amount equal to the proper rateable part of the estate duty in respect of the sum so charged (*m*).

Where, however, by a settlement made in the year 1861, a father covenanted, upon the marriage of his son, for the payment to his daughter-in-law after his death of a jointure of £1,000 a year "without any deduction whatsoever, except in respect of income tax," it was held that these words constituted an "express provision to the contrary" within s. 14 (1) of the Act, and that no part of the estate duty was payable by the daughter upon the death of the father (*n*).

Incidence of duty as between persons having limited interests.

Although a proportionate part of the estate duty payable in respect of property which does not pass to the executor as such is made a charge on the property (*o*), the Act contains no express provision as to the manner in which the burden of the charge is to be borne by the different persons interested in the property, namely, as between tenant for life and remainderman.

The scheme of the Act, however, is "that the duty shall be levied on the inheritance, and the inheritance shall bear it." A limited owner is not therefore chargeable with any part of the duty as a whole, but every person having a limited interest in the property must bear the burden of the duty in proportion to his limited interest. Thus, a tenant for life of property charged with the payment of estate duty must, in any case, suffer a diminution of income in respect of the charge.

(*m*) *Re Hacket*, *Hacket* v. *Gardiner*, [1907] 1 Ch. 385.
(*n*) *Re Parker Jervis*, *Salt* v. *Locker*, [1898] 2 Ch. 643.
(*o*) 57 & 58 Vict. c. 30, s. 9 (1). See *ante*, p. 382.

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Either a portion of the estate subject to the charge of estate duty will be sold for the purpose of meeting the charge, in which case he will receive less income from the property, or it will be necessary to raise a sum of money for that purpose by way of mortgage upon the property, in which case he will be bound to keep down the interest on the mortgage money (*p*). Where, on the death of a tenant for life of property settled in strict settlement, a jointure of £500 per annum became payable, it was held that, the tenant for life in possession and the jointress being both limited owners, the liability of the latter in respect of the charge of estate duty was to pay interest during her life upon so much of the duty as was attributable to the value of her jointure ascertained at the number of years' purchase adopted by the Inland Revenue Office in assessing the duty on the whole estate (*q*).

Settlement estate duty.

It was decided in *Re Webber, Gribble* v. *Webber* (*r*), that the incidence of settlement estate duty under the Finance Act, 1894 (*s*), was the same as that of estate duty. In consequence of this decision it was enacted by s. 19 (1) of the Finance Act, 1896 (*t*), that:

> "The settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate."

Construction of section.

The above section must be treated merely as having reversed the decision in *Re Webber*, and to have declared that settlement estate duty payable in respect

(*p*) See *per* KEKEWICH, J., in *Re Parker Jervis, Salt* v. *Locker*, [1898] 2 Ch. 643, 657.

(*q*) *Ibid.* See *Re Duke of St. Albans, Loder* v. *Duke of St. Albans*, [1900] 2 Ch. 873.

(*r*) [1896] 1 Ch. 914; *Re Gibbs, Thorne* v. *Gibbs*, [1898] 1 Ch, 625.

(*s*) 57 & 58 Vict. c. 30.

(*t*) 59 & 60 Vict. c. 28.

of property settled by will is to be borne by the settled property. It must not be inferred that because property settled by will is alone mentioned in the section, settlement estate duty payable in respect of property settled by some instrument outside the will is not to be borne by the property so settled. On the contrary, the incidence of settlement estate duty is in every case upon the settled property in the absence of any expression of intention to the contrary (*u*). "Settlement estate duty, although described and imposed as a further estate duty, is imposed, not on the general estate of the deceased, but on specific portions of it, and ought in common fairness to be borne by those who take those portions" (*x*).

"Express provision to contrary" in settlement.

The words "without any deduction" contained in a covenant in a settlement for payment of a sum of money to the trustees thereof, afford sufficient indication of contrary intention (*y*).

"Express provision to contrary" in will.

Where, as frequently happens, there is a direction in the will for payment in general terms of debts and other charges and expenses out of residue or out of a specific fund, without any specific mention of "settlement estate duty," the question arises whether the expressions used are sufficient to include settlement estate duty so as to constitute the direction "an express provision to the contrary" contained in the will within the meaning of s. 19 (1) of the Act of 1896.

A direction to pay "estate duty" out of residuary personal estate has been held to include settlement estate duty (*z*), and directions to pay out of residue "my debts, funeral and testamentary expenses and

(*u*) *Re Maryon-Wilson, Wilson* v. *Maryon-Wilson*, [1900] 1 Ch. 565.

(*x*) *Ibid, per* LINDLEY, L.J., at p. 570.

(*y*) *Ibid.* See *Re Turnbull, Skipper* v. *Wade*, [1905] 1 Ch. 726, 733, where legacies were directed to be paid "free from duty."

(*z*) *Re Leveridge, Spain* v. *Lejoindre*, [1901] 2 Ch. 830.

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duties (*a*), and, out of a specific fund, "the death duties payable out of my estate" (*b*), have been similarly construed. Inasmuch, however, as settlement estate duty is not payable in order to obtain probate (*c*), it has been held that a direction to pay "testamentary expenses" out of residue does not include the payment of settlement estate duty (*d*); and where there was a direction to pay "all duties payable by law out of my estate" out of a specific fund, it was held that the "duties payable by law out of my estate" meant the duties thrown upon the residuary estate, and did not include settlement estate duty, which the law has said shall be payable out of the settled legacy (*e*).

Incidence of duty as between persons having limited interests.

The rule laid down in *Re Parker-Jervis* (*f*) as to the manner in which the burden of estate duty charged upon property which does not pass to the executor as such must be borne by the different persons interested in the property, is applicable for determining the proper proportions in which settlement estate duty must be borne by the different persons interested in the settled property (*g*).

Legacy duty.

The incidence of legacy duty is upon the legatee (*h*), or, in case of assignment, upon his assignee (*i*), in the absence of any direction in the will that the legacy is to be paid free of duty.

Contrary intention.

A direction that all legacies shall be "paid" free of legacy duty is sufficient to exonerate specific as well as

(*a*) *Re Pimm, Sharpe* v. *Hodgson*, [1904] 2 Ch. 345. See *Re Turnbull, Skipper* v. *Wade*, [1905] 1 Ch. 726.

(*b*) *Re Cayley, Awdry* v. *Cayley*, [1904] 2 Ch. 781.

(*c*) See 59 & 60 Vict. c. 28, s. 19 (2).

(*d*) *Re King, Travers* v. *Kelly*, [1904] 1 Ch. 363. See *Re Duke of St. Albans, Loder* v. *Duke of St. Albans*, [1900] 2 Ch. 873.

(*e*) *Re Lewis, Lewis* v. *Smith*, [1900] 2 Ch. 176. See *Re Cayley, Awdry* v. *Cayley, supra*.

(*f*) [1898] 2 Ch. 643; *ante*, p. 385.

(*g*) *Re Duke of St. Albans, Loder* v. *Duke of St. Albans*, [1900] 2 Ch. 873. See and distinguish *De Quetteville* v. *De Quetteville*, 93 L. T. 579.

(*h*) 36 Geo. 3, c. 52, ss. 6, 24. See *Re Bourne, Martin* v. *Martin*, [1893] 1 Ch. 188, 191.

(*i*) *Re Repington, Wodehouse* v. *Scobell*, [1904] 1 Ch. 811.

general legacies (*k*), but does not of course exempt the residue (*l*).

Where legacies have been directed to be paid "without any deduction" (*m*), "free from any charge or liability" (*n*), "free of all expense" (*o*), or "clear" (*p*), it has in each case been held that the duty was thrown upon the general personal estate.

Succession duty.

By s. 42 of the Succession Duty Act, 1853 (*q*), succession duty is made a—

> "first charge on the interest of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty shall be assessed; and such duty shall also be a first charge on the interest of the successor in the personal property in respect whereof the same shall be assessed, while the same shall remain in the ownership or control of the successor, or of any trustee for him, or of his guardian or committee, or tutor or curator, or of the husband of any wife who shall be the successor;"

and by the same section succession duty is made a debt due to the Crown from the successor.

SECTION IV.

OF MARSHALLING ASSETS.

Paramount claim of creditors to payment of their debts.

The order in which the several funds comprising the estate of a deceased person are successively subject to the burden of his debts, is based upon the presumed

(*k*) *Re Johnston, Cockerell* v. *Essex*, 26 Ch. D. 538.

(*l*) *Lord Londesborough* v. *Somerville*, 19 Beav. 295.

(*m*) *Barksdale* v. *Gilliat*, 1 Swans. 562. See *Smith* v. *Anderson*, 4 Russ. 352.

(*n*) *Warbrick* v. *Varley*, 30 Beav. 241.

(*o*) *Gosden* v. *Dotterell*, 1 My. & K. 56.

(*p*) *Ford* v. *Ruxton*, 1 Coll. 403. See *Cole's Will*, L. R. 8 Eq. 271.

(*q*) 16 & 17 Vict. c. 51. On a sale of settled real estate by trustees under a power of sale, the purchaser takes succession duty free, and the charge by virtue of this section is shifted to the purchase-money (*Dugdale* v. *Meadows*, L. R. 6 Ch. App. 501).

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intention of the deceased. It has been seen, however, that until all the debts are paid or provided for, the personal representative is not concerned to consider his testator's intentions with regard to the disposition of the property. It does not follow, therefore, that what is usually termed the established order of application of assets in payment of debts, will in all cases be the order in which they will be immediately applied for that purpose. The property of a deceased person vests upon death in his personal representative upon trust for the special purposes of administration; and the paramount trust which the law imposes upon the personal representative is that of paying the debts of the deceased. A common law action of debt is maintainable by any creditor of the deceased against the personal representative, and judgment for payment of the debt *de bonis testatoris* may be recovered against him provided he has assets properly applicable for the purpose (*r*).

Necessity of disregarding established order of application of assets.

It necessarily follows that the personal representative will frequently be obliged, owing to the exigencies of administration, to disregard in the first instance the established order of application, and to resort for the payment of debts to funds which, as between beneficiaries, are not primarily liable for their payment.

Marshalling protects rights of beneficiaries *inter se*.

The doctrine of marshalling protects the rights of beneficiaries *inter se*. By means of marshalling, the ultimate incidence of the deceased's debts is thrown upon those funds which it is presumed the deceased intended to be used for the payment of his debts, notwithstanding the immediate application in payment thereof of funds not intended for their payment. Marshalling has been described (*s*) as "the adjustment between several persons of their rights respectively, *inter se*, in respect of a charge or claim, which, affecting

(*r*) See *post*, p. 429.

(*s*) *Tombs* v. *Roch*, 2 Coll. 490, 499.

all of them, or properties belonging to all of them respectively, has been or may be enforced in a manner not unjust, as far as the person is concerned, by whom it was or may be enforced, but not just as between the persons or properties liable."

Principle of marshalling.

Marshalling is thus a purely equitable doctrine, the principle of which is that a person having two or more funds to satisfy his demands shall not by his election disappoint a party who has only one fund (*t*). The doctrine in no way interferes with the election of the person having the two or more funds to proceed to satisfy his claim out of whichever fund he pleases; but, while recognising the legal or paramount claim of the person in the position to elect, it confers upon the party whose claim is upon one only of those funds the right in equity as regards the remaining funds to stand in the place of the person so electing, to the extent to which the one fund has by the election been exhausted or diminished—the right, in legal phraseology, to marshal the remaining funds.

Requisites of marshalling.

The requisites for marshalling may thus be stated as follows: (1) There must be several claimants or sets of claimants against the property of the same person; (2) this property must consist of two or more distinct funds; (3) one claimant or set of claimants must have a right to resort to more than one fund, and another claimant or set of claimants must have the right to resort to one only of those funds; (4) a claimant or set of claimants having the right to resort to more than one of the funds, must have been paid out of the only fund to which another claimant or set of claimants can resort.

The doctrine of marshalling has been applied, in the administration of assets, to two distinct classes of

(*t*) *Lanoy* v. *Duke of Athol*, 2 Atk. 444, 446; *Aldrich* v. *Cooper*, 8 Ves. 382.

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cases, namely, in favour of creditors, and in favour of beneficiaries.

Marshalling in favour of creditors.

A creditor's right to marshal arose where another creditor, for the payment of whose debt any part of the deceased's estate was available, obtained satisfaction of his debt out of the only fund available for the payment of the former's debts. Thus, under the old law, if a creditor by specialty in which the heir was bound recovered his debt from the personal representative out of the assets come to the hands of the latter, and so rendered those assets insufficient for the payment of creditors otherwise than by specialty binding the heir, equity would allow the latter class of creditors to stand in the place of the creditor by specialty as against any real estate of which he might have availed himself (*u*).

Now, however, all the property of a deceased person is assets either at law or in equity, for the payment of all classes of creditors, and the doctrine is applied in favour of beneficiaries only.

Marshalling in favour of beneficiaries.

A beneficiary's right to marshal arises whenever in the course of administration creditors have claimed and obtained payment of their debts out of the only fund to which the beneficiary can lay claim, as against other beneficiaries under the will or upon the intestacy of the deceased.

Illustrations of the right of beneficiaries to marshal.

Thus, if reference be made again to the established order of application of assets it will be seen that, so far as that order has been disturbed by the payment of creditors, beneficiaries to whom real estate has been devised in trust to pay debts may claim to marshal or to be repaid out of the general personal estate (*x*); the heir may claim to be recouped, first out of the general personal estate (*y*), and, secondly, out of real estate

(*u*) *Wilson* v. *Fielding*, 2 Vern. 763; *Cradock* v. *Piper*, 15 Sim. 301.
(*x*) *Johnson* v. *Milksopp*, 2 Vern. 112.
(*y*) *White* v. *White*, 2 Vern. 43.

devised in trust for the payment of debts (*z*); devisees of real estates charged with the payment of debts may claim to have marshalled in their favour, first, the general personal estate (*a*), secondly, real estate devised in trust for the payment of debts, and thirdly, lands descended (*b*).

Pecuniary legatees, who come next in the established order to devisees of real estate charged with the payment of debts, will be entitled, if the personal estate, the fund out of which their legacies are payable, has been applied in payment of debts so as to have become insufficient to satisfy their legacies, to marshal against, and be paid the amount of their legacies, first, out of lands devised in trust for the payment of debts (*c*); secondly, out of lands descended (*d*); thirdly, out of real estate devised subject to a charge of debts (*e*).

So, again, specific and residuary devisees and specific legatees may marshal against those funds anterior in the order of application to the subject of the specific or residuary devise or the specific bequest (*f*); and appointees against those funds anterior to the fund appointed (*g*). Lastly, if a widow's paraphernalia be applied in payment of her husband's debts, she may claim to be recouped out of any other funds comprising her husband's estate (*h*).

(*z*) *Manning* v. *Spooner*, 3 Ves. 114.

(*a*) *Watson* v. *Brickwood*, 9 Ves. 447.

(*b*) *Harmood* v. *Oglander*, 8 Ves. 106, 124.

(*c*) *Haslewood* v. *Pope*, 3 P. Wms. 322.

(*d*) *Sproule* v. *Prior*, 8 Sim. 189.

(*e*) *Re Salt, Brothwood* v. *Keeling*, [1895] 2 Ch. 203; *Re Stokes, Parsons* v. *Miller*, 67 L. T. 223; *Re Roberts, Roberts* v. *Roberts*, [1902] 2 Ch. 834; *Re Kempster, Kempster* v. *Kempster*, [1906] 1 Ch. 446.

(*f*) See cases cited, *ante*, p. 369, notes (*y*) and (*z*).

(*g*) See case cited, *ante*, p. 369, note (*a*).

(*h*) *Northey* v. *Northey*, 2 Atk. 78; *Tipping* v. *Tipping*, 1 P. Wms. 729.

CHAPTER XVII.

OF THE FINAL DISTRIBUTION OF ASSETS.

SECTION I.

Of Payment and Appropriation.

In all cases some little time must necessarily elapse after the deceased's death before it will be possible for his personal representative to ascertain how much of the estate is available for distribution and among whom and in what proportions it is distributable, and before, therefore, a final distribution of the assets can be proceeded with.

Time allowed for distribution of estate by administrator.

It has already been seen that, in the case of intestacy, the date of distribution is postponed by statute (*a*) until the year is fully expired after the intestate's death.

By executor.

By analogy to the statute the law allows an executor a period of one year from the testator's death as a reasonable time within which to inform himself fully as to the state of the property and the extent of the liability of the deceased; and within that period he cannot be compelled to pay any legacy or distribute the residue (*b*), notwithstanding any direction to the contrary contained in the will. Thus, where a testator directed a legacy to be paid within six months after his death, and further directed that his residue should be divided between such of certain named persons as

(*a*) 22 & 23 Car. 2, c. 10, s. 8.

(*b*) 4 Bac. Abr. (7th ed.), p. 434; *Wood* v. *Penoyre*, 13 Ves. 325, 333; *Benson* v. *Maude*, 6 Madd. 15.

should be living at the time when the same should be distributed, it was held that the residue was divisible between such of those persons as were living at the end of the year from the testator's death (*c*).

The rule is established for the convenience of the representative, and does not preclude him from proceeding to a final distribution within the period of a year should circumstances permit of his doing so (*d*).

How final distribution can be compelled.

A beneficiary cannot at any time maintain an action at law against the administrator for the recovery of his distributive share under an intestacy (*e*), nor against the executor for payment of his legacy (*f*) until the latter's assent to the legacy has been obtained (*g*). If the personal representative refuse, without just cause, to proceed to a final distribution of the deceased's effects, the proper remedy of the beneficiary is by action or summons in the Chancery Division for the execution of the trusts of the will or the administration of the estate of the deceased (*h*). Such an action may be commenced notwithstanding that a year has not elapsed since the death of the deceased, but will be stayed if the legacy be paid within that period (*i*).

Statute of Limitations as to recovery of legacies.

By s. 8 of the Real Property Limitation Act, 1874 (*k*), it is provided that in the absence of any part payment or acknowledgment such as therein mentioned, no action or suit shall be brought to recover any legacy but within twelve years next after a present right to receive the same (*l*) shall have accrued to some person capable

(*c*) *Brooke* v. *Lewis*, 6 Madd. 358.

(*d*) *Angerstein* v. *Martin*, 1 Turn. & Russ. 232, 241; *Garthshore* v. *Chalie*, 10 Ves. 13; *Wood* v. *Penoyre*, 13 Ves. 325.

(*e*) *Jones* v. *Tanner*, 7 B. & C. 542.

(*f*) *Deeks* v. *Strutt*, 5 T. R. 690.

(*g*) *Post*, p. 409.

(*h*) 36 & 37 Vict. c. 66, s. 34.

(*i*) *Prosser* v. *Mossop*, W. N. (1881), p. 38.

(*k*) 37 & 38 Vict. c. 57, s. 8.

(*l*) *Binns* v. *Nichols*, L. R. 2 Eq. 256.

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of giving a discharge for or release of the same. An executor, notwithstanding that he is always in a sense a trustee for creditors and legatees, is entitled to the benefit of this enactment unless under the will he is constituted also an express trustee of the amount sought to be recovered (*m*). A share of residue is a legacy within the meaning of the section (*n*).

Statute of Limitations as to recovery of distributive share under intestacy.

As regards the recovery of distributive shares under an intestacy, s. 13 of the Law of Property Amendment Act, 1860 (*o*), provides that no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same (*p*), shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto or his agent (*q*).

By the above statutes further periods of twelve and twenty years respectively are limited within which suits must be brought after part payment or acknowledgment.

Payment of interest on general legacy.

The right of a legatee to claim interest on a general legacy will depend, in the absence of any express

(*m*) 36 & 37 Vict. c. 66, s. 25 (2); *Re Davis, Evans* v. *Moore*, [1891] 3 Ch. 119 [C. A.]; *Re Mackay, Mackay* v. *Gould*, [1906] 1 Ch. 25. *Cf. Re Timmis, Nixon* v. *Smith*, [1902] 1 Ch. 176; *Doyle* v. *Foley*, [1903] 2 I. R. 95; and *post*, pp. 406, 462.

(*n*) *Prior* v. *Horniblow*, 2 You. & Coll. 200; *Re Rowe*, 58 L. J. Ch. 703; *Re Davis, supra; Re Mackay, supra.*

(*o*) 23 & 24 Vict. c. 38.

(*p*) *Re Johnson, Sly* v. *Blake*, 29 Ch. D. 964; *Re Pardoe, McLaughlin* v. *Penny*, [1906] 1 Ch. 265, reversed on the facts, [1906] 2 Ch. 340.

(*q*) See generally as to the application of the Act, *Re Lacy, Royal General, etc. Association* v. *Kydd*, [1899] 2 Ch. 149.

direction contained in the will, upon his right thereunder to payment of the legacy itself.

Immediate general legacy.

Thus the rule is that an immediate general legacy will carry interest at four per cent. (*r*) from the expiration of a year from the testator's death if it be not then paid to him (*s*), except where the testator is the parent, or stands *in loco parentis* to the legatee (*t*), and except where the legacy is in satisfaction of a debt and no time is fixed for its payment (*u*), in which cases interest will commence to run from the date of the death, or, in the latter case, if the will mentions a date for payment, from that date (*x*).

Contingent general legacy.

On the other hand, a contingent legacy will not, as a general rule, carry interest while it is in suspense; though where the testator is the parent, or is *in loco parentis* to an infant legatee of a contingent legacy, and has provided no other fund for his maintenance, the legacy will bear interest for the maintenance (*y*). But the fact that the legacy is to bear interest for such a purpose, though it may be and often is shortly referred to by saying that the legacy bears interest, does not make the legacy the less a contingent one, or put the infant into the position of having an immediate vested life interest in the income of the legacy (*z*).

(*r*) R. S. C., Order LV., r. 64.

(*s*) *Gibson* v. *Bott*, 7 Ves. 89; *Sitwell* v. *Bernard*, 6 Ves. 520; *Re Tinkler*, L. R. 20 Eq. 456; 45 L. J. Ch. 135; *Re Percy*, *Percy* v. *Percy*, 24 Ch. D. 616; *Re Friend*, *Friend* v. *Young*, 78 L. T. 222. See as to legacies charged on land, *Pearson* v. *Pearson*, 1 Sch. & Lef. 10; *Turner* v. *Buck*, L. R. 18 Eq. 301; *Re Waters*, *Waters* v. *Boxer*, 42 Ch. D. 517.

(*t*) *Butler* v. *Butler*, 3 Atk. 58; *Crickett* v. *Dolby*, 3 Ves. 10, 13; *Stent* v. *Robinson*, 12 Ves. 461; *Re Whittaker*, *Whittaker* v. *Whittaker*, 21 Ch. D. 657.

(*u*) *Clark* v. *Sewell*, 3 Atk. 96, 98.

(*x*) *Re Rattenberry*, *Ray* v. *Grant*, [1906] 1 Ch. 667, 671.

(*y*) *Re George*, 5 Ch. D. 837 [C. A.]; *Re Moody*, *Woodroffe* v. *Moody*, [1895] 1 Ch. 101; *Re Bowlby*, *Bowlby* v. *Bowlby*, [1904] 2 Ch. 685, 698, 712 [C. A.]. See also *Re Richards*, L. R. 8 Eq. 119.

(*z*) *Per* ROMER, L.J., in *Re Bowlby*, *supra*, at p. 706.

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And where from the form of the gift an intention can be gathered to exclude the general rule, a legatee of a contingent legacy will be entitled to claim intermediate income.

Where legacy segregated.

Thus, wherever a gift is of a fund separated by the will from the rest of the testator's property for the benefit of the objects of the gift—in other words, if a legacy be segregated for the benefit of the legatee—interest will commence to run from the testator's death (*a*).

Where legacy residuary.

So, again, a contingent gift, whether of personalty alone or of realty and personalty, if it be residuary, will carry intermediate income (*b*), although a residuary contingent gift of realty alone will not do so (*c*).

Instalments of annuity.

An annuity given by will is considered as intended to commence at the death of the testator, unless there are circumstances or expressions in the will to control that presumption (*d*); and the instalments of an annuity are payable as directed in the will (*e*).

Interest on immediate specific legacy.

An immediate specific legacy is deemed to have been separated from the general estate, and appropriated as from the time of the testator's death, and the legatee is accordingly entitled to whatever produce accrues upon it from that time (*f*).

(*a*) *Dundas* v. *Wolfe Murray*, 1 H. & M. 425; *Gotch* v. *Foster*, L. R. 5 Eq. 311; *Beavan* v. *Beavan*, 24 Ch. D. 649 n.; *Re Judkins' Trusts*, 25 Ch. D. 743; *Kidman* v. *Kidman*, 40 L. J. Ch. 359; *Re Medlock*, 55 L. J. Ch. 738; *Re Inman*, *Inman* v. *Rolls*, [1893] 3 Ch. 518; *Re Clements*, *Clements* v. *Pearsall*, [1894] 1 Ch. 665; *Re Bowlby*, *Bowlby* v. *Bowlby*, [1904] 2 Ch., at pp. 704, 705 [C. A.].

(*b*) *Genery* v. *Fitzgerald*, Jac. 468; *Re Dumble*, *Williams* v. *Murrell*, 23 Ch. D. 361; *Re Burton*, *Banks* v. *Heaven*, [1892] 2 Ch. 38; *Re Adams*, [1893] 1 Ch. 329; *Re Taylor*, *Smart* v. *Taylor*, [1901] 2 Ch. 134.

(*c*) *Bective* v. *Hodgson*, 12 W. R. 625.

(*d*) *Houghton* v. *Franklin*, 1 Sim. & St. 390; *Re Robbins*, *Robbins* v. *Legge*, [1907] 2 Ch. 8 [C. A.].

(*e*) *Irvin* v. *Ironmonger*, 2 Russ. & M. 531.

(*f*) *Sleech* v. *Thorington*, 2 Ves. 560; *Barrington* v. *Tristram*, 6 Ves. 345; *Re Jeffery's Trusts*, L. R. 2 Eq. 68; *De Gendre* v. *Kent*, L. R. 4 Eq. 283, 285; *Whitehead* v. *Whitehead*, L. R. 16 Eq. 528; *Re Marten*, *Shaw* v. *Marten*, [1901] 1 Ch. 370.

But a contingent specific legacy will not carry intermediate income (*g*), unless the subject-matter of the gift is directed to be set apart from the rest of the estate (*h*).

Contingent specific legacy.

In the case of legacies to persons under disability or made payable *in futuro*, and in the case of contingent legacies, it is obvious that the trusteeship (*i*) of the personal representative may be prolonged beyond the period of a year from the testator's death.

Effect of disability of legatee.

Thus it is a general rule that an executor cannot safely pay a legacy to an infant until he attains full age (*k*); nor can he, without the sanction of the Court (*l*), pay the legacy, on the infant's account, to his father or guardian, or other relative. If an executor pay an infant's legacy, though in perfect good faith, to his father or any other person on behalf of the infant, he will be liable to pay the legacy over again to the infant legatee when he comes of age (*m*), unless the legatee after he has attained full age, is estopped by laches from claiming repayment, or by some act which amounts to a ratification of the previous payment (*n*). Of course, a testator may, by his will, direct a legacy given for the benefit of an infant to be paid to his father or any other person as trustee for the infant, and in such case the executor is not only entitled but bound to pay the legacy to such trustee, whose receipt will be a good discharge (*o*).

Rule as to payment of legacy to infant.

Where direction as to payment contained in will.

An executor may, however, free himself from all further liability with regard to a legacy given to an infant by paying the amount of the legacy into Court, under s. 42 of the Trustee Act, 1893 (*p*). In such case the receipt or certificate of the proper officer will be a

Payment into court.

(*g*) *Guthrie* v. *Walrond*, 22 Ch. D. 573.

(*h*) *Re Woodin, Woodin* v. *Glass*, [1895] 2 Ch. 309 [C. A.].

(*i*) As to the sense in which the expression "trusteeship" is here used, see the cases cited *ante*, p. 396, n. (*m*).

(*k*) Toller (7th ed.), p. 314; *Davies* v. *Austen*, 3 Bro. C. C. 178.

(*l*) 4 Bac. Abr. (7th ed.) 429; *Rotherham* v. *Fanshaw*, 3 Atk. 629.

(*m*) *Philips* v. *Paget*, 2 Atk. 80.

(*n*) *Cooper* v. *Thornton*, 3 Bro. C. C. 96.

(*o*) *Ibid.*

(*p*) 56 & 57 Vict. c. 53.

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sufficient discharge for the money so paid (*q*). This enactment, replacing an earlier enactment of the reign of Geo. III. (*r*), applies where an infant is entitled either to a legacy or to a share of residue (*s*).

Payment of legacy where legatee beyond seas.

Again, payment of a legacy may be impossible by reason of the legatee being beyond seas. If the legatee's address is known he may be communicated with by the executor, and either a person may be appointed by power of attorney to receive and give a receipt for the money in this country, or the amount of the legacy may be remitted to an agent of the executor in the country where the legatee is residing, to be paid over to the legatee in exchange for his receipt. But if the legatee is out of reach of communication, or if his address is not known, the executor may either appropriate a sum of money to answer the legacy, and in a proper case invest it for the benefit of the legatee (*t*), or may relieve himself from liability by paying the legacy into Court, under s. 42 of the Trustee Act, 1893 (*u*), as in the case of a legacy to an infant.

Appropriation in the strict sense.

An appropriation, in the strict sense of the word, by an executor of a specific portion of the assets to answer a vested legacy—an appropriation, that is to say, which will amount to payment of the legacy so as to bind the legatee and free the residue—cannot be made where the legatee is not competent to make a bargain or give a receipt, as, for instance, in the case of an infant legatee (*v*). Under many circumstances, however, appropriation as a means of payment may properly be made.

—In respect of legacies payable *in futuro*.

In the first place, the rule is established in regard to legacies and annuities (*x*), which, though vested, are

(*q*) Sect. 42 (2). See *Re Salaman, De Pass* v. *Sonnenthal*, [1907] 2 Ch. 46.

(*r*) 36 Geo. 3, c. 52, s. 32. (*s*) See R. S. C., Order LIVB.

(*t*) See *per* ROMER, L.J., in *Re Hall, Foster* v. *Metcalfe*, [1903] 2 Ch. 226, 233.

(*u*) 56 & 57 Vict. c. 53. (*v*) *Re Salaman, supra.*

(*x*) An annuity is a legacy. See *Sibley* v. *Perry*, 7 Ves. 522; *Bromley* v. *Wright*, 7 Hare, 334; *Ward* v. *Grey*, 26 Beav. 485; *Gaskin* v. *Rogers*, L. R. 2 Eq. 284; *Re Robbins, Robbins* v. *Legge*, [1907] 2 Ch. 8 [C. A.].

payable *in futuro* that executors are not merely justified, but compellable in equity to set apart a sufficient part of the testator's personal estate to answer the legacy as and when it becomes due and payable (*y*). "If there is a vested legacy which will certainly be payable *in futuro*, I take it," says VAUGHAN WILLIAMS, L.J., in *Re Hall, Foster* v. *Metcalfe* (*z*), "the legatee has an absolute right to go to the trustee or executor and say: 'Although my legacy is payable *in futuro*, it is a vested legacy, and I require you to invest the amount of it'; and not only would the legatee have the right to require that, but he could insist upon its being done, and when it was done that would be an appropriation in the strict sense of the word, and the gain or loss upon the investment (as the case might be) would go to or fall upon the legatee. And that is what I understand Lord HARDWICKE to have meant when he said, in *Johnson* v. *Mills* (*a*), 'I thought nothing was better settled than what is now endeavoured to be made a question: that wherever a demand was made out of assets, certainly due but payable at a future time, the person entitled thereto might come against the executor to have it secured for his benefit, and set apart in the meantime, that he might not be obliged to pursue these assets through several hands.'"

—in respect of contingent legacies where interest directed to be paid in meantime.

It is sometimes permissible for an executor to make an appropriation of personal estate to meet a contingent legacy. Where, for instance, income arising from the legacy is directed to be paid to the legatee before the happening of the contingency upon which the legacy is made payable, it may properly be inferred that the testator intended that a fund should be set apart and

(*y*) *Phipps* v. *Annesley*, 2 Atk. 57; *Johnson* v. *Mills*, 1 Ves. 282; *Green* v. *Pigott*, 1 Bro. C. C. 103; *Pullen* v. *Smith*, 5 Ves. 21; *Re Tredwell, Jaffray* v. *Tredwell*, 65 L. T. 742; *Re Hall, Foster* v. *Metcalfe*, [1903] 2 Ch. 226.

(*z*) *Supra*, at pp. 231, 232.

(*a*) *Supra*.

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invested to answer the legacy (*b*); but a contingent legacy directed to be raised out of real estate cannot be raised until the happening of the contingency, even though interest is given by the will in the meantime (*c*).

—in respect of contingent legacies where no interest directed to be paid in meantime.

Where, however, the legacy is purely contingent and no provision is made as to the application of interest in the meantime, it is not competent of the executor, without the consent of the legatee, to make an appropriation, in the strict sense of the word, out of the estate to meet the legacy (*d*); nor is the legatee entitled to demand that any such appropriation shall be made (*e*). In such a case the executor must, in the absence of arrangement, retain as part of the general estate a sum reasonably sufficient to answer the legacy when it becomes payable, and, having done so, may proceed to distribute the residue among the persons entitled without being held personally liable to make good any deficiency which may subsequently arise, provided he has acted reasonably in the matter. "But the fund so set apart would be set apart, not as the legacy, but to answer or secure the legacy, and the fund would still remain part of the estate, and the income ought properly to be paid as part of the residue" (*f*).

—in respect of immediate legacies.

As regards immediate legacies, it has been generally considered in practice, where the will contains no express powers of appropriation, that the safest course to adopt is for the executors to sell, call in and convert into money such parts of the personal estate of the testator as do not consist of money, and to pay over the legacies to the persons entitled thereto in cash, so as to

(*b*) *Green* v. *Pigott*, 1 Bro. C. C. 103; *Re Hall*, *Foster* v. *Metcalfe*, [1903] 2 Ch. 226.

(*c*) *Gawler* v. *Standerwick*, 2 Cox, 15.

(*d*) *Re Hall*, *Foster* v. *Metcalfe*, *supra*.

(*e*) *Webber* v. *Webber*, 1 Sim. & St. 311; *King* v. *Malcott*, 9 Hare, 692, 696.

(*f*) *Per* ROMER, L.J., in *Re Hall*, *supra*, at p. 233.

avoid any disputes in the future as to the propriety of the appropriation. And, accordingly, express powers are often given by will to the executors or trustees either with or without the consent of such beneficiaries as are of full age to appropriate property in or towards satisfaction of legacies or shares of residue (*g*).

There is, nevertheless, not the slightest doubt as to the power of executors, in a proper case, to make a valid appropriation of a specific portion of the assets in favour of a particular legatee, capable of entering into the bargain, without the concurrence of the remaining legatees. Where there is an express trust for sale and conversion, or where, apart from any such express trust, the executors are bound in ordinary course of administration to turn assets of the testator into money and apply them to a legacy, it is competent of the executors to agree with the legatee to take a specific portion of the assets in satisfaction either wholly or *pro tanto* of the legacy or share of residue to which he is entitled, such a transaction being in the nature of a sale of a particular asset, which the executors are bound to convert, to the *cestui que trust*, the purchase money for that asset being set off against the portion which the *cestui que trust* is entitled to in the testator's estate (*h*).

An appropriation made by executors in pursuance of their general power thus to appropriate must depend for its validity upon the particular circumstances of the case. Provided that the transaction is a fair one, and that the legatee in whose favour the appropriation is made does not receive more than his share of the assets, regard being had to their value as a whole, the appropriation cannot be impeached (*i*).

(*g*) Byth. & Jarm. Conv. (4th ed.), vol. vii., p. 881 ; Key & Elph. Conv. (8th ed.), vol. ii., p. 750.

(*h*) *Re Lepine*, *Dowsett* v. *Culver*, [1892] 1 Ch. 210 [C. A.] ; *Re Beverley*, *Watson* v. *Watson*, [1901] 1 Ch. 681.

(*i*) *Re Lepine*, *supra*, at pp. 216, 218.

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An appropriation in satisfaction of a settled legacy or share of residue may validly be made with the consent of the trustees of the settlement, provided the specific assets appropriated are investments of a nature authorised by law or the terms of the will for the investment of trust moneys (*k*).

The power to appropriate is not confined to pure personal estate, but extends to chattels real, and now, apparently, by virtue of s. 2 (2) of the Land Transfer Act, 1897 (*l*), extends also to real estate which is subject to a trust for sale and conversion (*m*).

Statutory power of appropriation.

By s. 4 (1) of the Land Transfer Act, 1897, a statutory power of appropriation, exercisable in the prescribed manner, is conferred upon executors in the absence of any express provision to the contrary contained in the will. The sub-section enacts as follows:

Appropriation of land in satisfaction of legacy or share in estate.

> "The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court."

(*k*) *Re Waters, Preston* v. *Waters*, W. N. (1889), p. 39; *Re Richardson, Morgan* v. *Richardson*, [1896] 1 Ch. 512; *Re Nickels, Nickels* v. *Nickels*, [1898] 1 Ch. 630; *Re Beverley*, [1901] 1 Ch. 681, at p. 688. And see *per* ROMER, L.J., in *Re Hall, Foster* v. *Metcalfe*, [1903] 2 Ch. 226, 233.

(*l*) 60 & 61 Vict. c. 65.

(*m*) *Re Beverley, supra*, at p. 686.

Extent of this enactment.

It would at first sight be inferred from the marginal note in this section that its provisions relate solely or mainly to appropriation of land, but the expressions "land" or "real estate" do not occur in the section, which is of general application, including all the residuary estate of a deceased person, whether real or personal (*n*).

The object of the sub-section appears to have been to enable executors, by following the prescribed provisions, to effect an appropriation of specific assets towards a legacy or share of residue which should be valid beyond dispute, whatever might be the particular circumstances of the case. Inasmuch as no "provisions" have as yet been prescribed, the sub-section remains for the present ineffective. It contains nothing, however, to take away or affect the power of executors to appropriate specific assets vested in them, apart from the Act, in satisfaction of legacies where the will contains an express trust for sale and conversion (*n*).

Effect of appropriation.

Where an appropriation of a specific part of the estate that is to say, an appropriation in the strict sense of the word, has validly been made by executors to answer a particular legacy, the fund appropriated ceases to remain a portion of the testator's estate and becomes the property of the legatee in whose favour the appropriation is made (*o*); and must be taken by him subject to any subsequent variations in value, whether by way of increment or loss (*p*). From the date of the appropriation the executors become trustees of the appropriated

(*n*) *Re Beverley*, [1901] 1 Ch. 681.

(*o*) *Re Hall, Foster* v. *Metcalfe*, [1903] 2 Ch. 227 [C. A.]. See *Frazer* v. *Murdoch*, 6 App. Cas. 855; *Hardoon* v. *Belilios*, [1901] A. C. 118, 124.

(*p*) *Green* v. *Pigott*, 1 Bro. C. C. 105; *Burgess* v. *Robinson*, 3 Mer. 9; *Rock* v. *Hardman*, 4 Madd. 253; *Kimberly* v. *Tew*, 4 Dr. & War. 139; *Frazer* v. *Murdoch*, 6 App. Cas. 855, at p. 865; *Re Waters, Preston* v. *Waters*, W. N. (1899), 39; *Re Richardson, Morgan* v. *Richardson*, [1896] 1 Ch. 512; *Re Hall, supra*, at p. 231.

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fund for the legatee with all the duties and liabilities of ordinary trustees (*q*). They are therefore bound to make and continue authorised investments of the appropriated fund and would not be justified in lending that fund with other parts of the residuary estate so as to render it undistinguishable from other parts of the estate, as, for instance, by lending it on a contributory mortgage (*r*).

Instrument of appropriation.

A form of appropriation of land in satisfaction of a legacy or share in residuary estate is given in the Schedule to the Provisional Land Transfer Rules recently issued (*s*). This form is, however, merely intended for production to the registrar, with other prescribed evidence of appropriation of land, to enable the person to whom the land is appropriated to be registered as proprietor of that land in place of the deceased proprietor (*t*). The appropriation in the prescribed form does not of itself operate as a conveyance of the land, and, except as regards registered land, a deed of conveyance chargeable apparently with *ad valorem* duty as a conveyance or transfer on sale within the meaning of the Stamp Act, 1891 (*u*), will be required (*x*).

(*q*) *Byrchall* v. *Bradford*, 6 Madd. 240; *Philippo* v. *Munnings*, 2 My. & C. 309; *Ex parte Dover*, 5 Sim. 500; *Re Walker*, *Walker* v. *Walker*, 62 L. T. 449; *Re Timmis*, *Nixon* v. *Smith*, [1902] 1 Ch. 176. See *Re Smith*, *Henderson-Roe* v. *Hitchins*, 42 Ch. D. 302; and compare cases cited *ante*, p. 396 n. (*m*).

(*r*) *Webb* v. *Jonas*, 39 Ch. D. 660. See *Re Massingberd's Settlement*, 63 L. T. 296.

(*s*) See Form 52.

(*t*) Rule 185.

(*u*) 54 & 55 Vict. c. 39.

(*x*) *Dawson* v. *Inland Revenue Commissioners*, [1905] 2 I. R. 69. See *Re Lepine*, *Dowsett* v. *Culver*, [1892] 1 Ch. 210 [C. A.]; *Re Beverley*, *Watson* v. *Watson*, [1901] 1 Ch. 681. And see 60 & 61 Vict. c. 65, s. 4 (2).

SECTION II.

OF ASSENT AND CONVEYANCE.

Legatee not entitled to take possession of legacy until assent.

An executor being answerable at law to creditors to the extent of the assets which have come into his hands, is protected by law by the rule that no legatee, whether specific or pecuniary, and whether of chattels real or personal, is entitled to take possession of his legacy, or can show a good title thereto, unless and until he has obtained the executor's assent to the legacy (*y*). Any direction in the will that a legatee may take his legacy without assent is simply nugatory as being in fraud of creditors (*z*).

Assent to gifts of residue.

The doctrine of assent applies to gifts of residue, and an executor may assent to part of a residuary gift, without assenting to the whole (*a*).

Assent to release of a debt.

So, also, in the case of a release by will of a debt due to the testator, the assent of the executor will be necessary to give effect to the testator's intention, the release in effect amounting to a legacy of the debt (*b*).

Legatee has inchoate right to legacy before assent.

Before assent, a legatee has merely an inchoate right to his legacy (*c*), a right nevertheless which, if he dies before the assent is given, will devolve upon his personal representatives (*d*).

Assent unnecessary in case of intestacy.

In the case of an intestacy, no question of assent arises, as there can be no specific or pecuniary legacies; but the administrator, after discharging the liabilities

(*y*) Wentw. Off. Ex. (14th ed.), pp. 67, 68, 408; Swinb. (7th ed.), pp. 37 *et seq.*, n. See Co. Lit. 111 a; *Lampet's Case*, 10 Rep. 52 b; *Bolles* v. *Nyseham*, Dyer, 254 b; *Mead* v. *Lord Orrery*, 3 Atk. 239.

(*z*) Wentw. Off. Ex. (14th ed.), p. 409.

(*a*) *Austin* v. *Beddoe*, 41 W. R. 619.

(*b*) *Sibthorp* v. *Moxton*, 1 Ves. 49.

(*c*) Toller (7th ed.), p. 306. See *Northey* v. *Northey*, 2 Atk. 77; *Farrington* v. *Knightly*, 1 P. Wms. 544, 554.

(*d*) Wentw. Off. Ex. (14th ed.), p. 69; *Cooper* v. *Cooper*, L. R. 7 H. L. 53, 65.

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of the intestate, distributes the residue of the assets amongst the next-of-kin, which may be done, either by payment of money, delivery of chattels, transfers of stock, etc., or assignment of leaseholds to the persons entitled, to answer whose shares such properties have been respectively appropriated.

Assent hitherto confined to personalty.

The doctrine of assent has not hitherto extended to a devise of an estate in fee, or to any estate carved out of the fee by the testator's will; so, where an owner in fee of land devised the same in fee, in tail, or for life, the devisee might have entered without the assent of the executors (*e*).

Land Transfer Act, 1897.

Inasmuch as by s. 1 of the Land Transfer Act, 1897 (*f*), real estate on death vests in the personal representative of the deceased, notwithstanding any contrary disposition in his will, it follows that nothing vests in the devisee by a devise, nor after the constitution of a personal representative, in the heir-at-law under an intestacy, without the express or implied assent of the personal representatives or a conveyance by them to him of the property.

Section 3 (1) of that Act provides accordingly that:

Provision for transfer to heir or devisee.

> "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance."

(*e*) See *ante*, Chapter IV.
(*f*) 60 & 61 Vict. c. 65.

Inchoate right of devisee before assent.

Until assent, apparently, the devisee will have an inchoate right to the property devised, which will be capable of conveyance *inter vivos* by the devisee, and in case of his death before assent, will devolve on his personal representatives as part of his real estate.

Effect of assent.

The effect of an assent is to vest the legal title to the property in the legatee or devisee without the necessity for any conveyance (*g*); and such property may thenceforth be recovered in an action at law, by the legatee or devisee against any person, including the personal representative, who may have possession of it (*h*).

Conveyance when necessary.

In the case of an intestacy as to real estate, a conveyance from the representatives must be taken by the heir-at-law, so as to effectually vest the property in him; and where a married woman is administratrix this may apparently be done without the concurrence of her husband in the conveyance and without any acknowledgment by her (*i*).

A devisee cannot insist upon a conveyance from the executor in preference to a written assent (*k*), but either one or the other should in all cases be required so as to obviate the question arising in the future as to whether the executor in fact assented.

Relation back of assent.

The assent of the personal representatives will no doubt for some purposes (*l*) relate back to the death of the testator, but whether for the purpose of confirming intermediate dealings with the property by the legatee,

(*g*) *Adams* v. *Peirce*, 3 P. Wms. 12; *Re Culverhouse*, *Cook* v. *Culverhouse*, [1896] 2 Ch. 251.

(*h*) *Bastard* v. *Stukely*, 2 Lev. 209; *Williams* v. *Lee*, 3 Atk. 223; *Doe* v. *Guy*, 3 East, 120; *Cole* v. *Miles*, 10 Hare, 179.

(*i*) See 56 & 57 Vict. c. 53, s. 16; *Re Brooke and Fremlin's Contract*, [1898] 1 Ch. 647; *Re Howgate and Osborn's Contract*, [1902] 1 Ch. 451; *cf. Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358.

(*k*) *Re Pix*, *Plimley* v. *Stileman*, [1901] W. N. 165.

(*l*) *Saunder's Case*, 5 Rep. 12 b.

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must be regarded as doubtful (*m*). In practice, at any rate, an assent should not be relied on as having any relation back for this purpose (*n*).

Assent irrevocable.

An assent once given is irrevocable, and will prevent the personal representative from recovering possession of the property from the legatee or devisee, unless a deficiency in the assets is subsequently created by the discovery of liabilities of the testator which were unknown at the time when the assent was given (*o*); or unless the assent was given under a misapprehension (*p*).

Assent does not, as a rule, prejudice creditors.

The personal representative, however, cannot by assenting to a gift, defeat the claims of creditors, who will generally be entitled, notwithstanding the assent, to follow the assets, however they may have been changed or altered, and all profits or increments thereof, into the hands of the legatee or devisee into whose possession they have come, provided that the property claimed as assets is capable of being identified as in fact acquired with, or shown to represent the original assets (*q*).

Exception.

This right of the creditor to follow the assets into the hands of the beneficiary is, however, a purely equitable right, and accordingly will not be enforceable in any case in which the position of the parties has become changed so as to render it inequitable under the circumstances to enforce it (*r*).

(*m*) Wentw. Off. Ex. (14th ed.), pp. 69, 445, 447; *Doe* v. *Hayes*, 7 Taun. 223. But see the statement in Toller, p. 311, citing Wentworth as an authority.

(*n*) *Saunder's Case*, 5 Rep. 12 b; Wentw. Off. Ex. (14th ed.), pp. 69, 445, 446; Toller (7th ed.), p. 311.

(*o*) *Davis* v. *Davis*, 8 Vin. Abr. 423, pl. 35; *Noell* v. *Robinson*, 2 Vent. 358; *Orr* v. *Kaines*, 2 Ves. 194; *Coppin* v. *Coppin*, 2 P. Wms. 296.

(*p*) *Livesey* v. *Livesey*, 3 Russ. 287. See Wentw. Off. Ex. (14th ed.), p. 415; *Mead* v. *Lord Orrery*, 3 Atk. 238.

(*q*) *March* v. *Russell*, 3 My. & C. 31. See *Pennell* v. *Deffell*, 4 De G. M. & G. 372; *Re Hallett*, 13 Ch. D. 696; *Leahy* v. *De Moleyns*, [1896] 1 I. R. 206.

(*r*) *Blake* v. *Gale*, 32 Ch. D. 571 [C. A.].

It has been held that if after an assent to a bequest of a term of years, the property is sold by the legatee to a *bonâ fide* purchaser, it will no longer be liable in the hands of the purchaser to the claims of creditors of the testator (*s*).

When assent should be given.

A personal representative ought not to assent to any legacy or to a devise, unless, in the latter case, the assent be made subject to a charge for the payment of any money which he is liable to pay, until he is satisfied that the assets of the testator are sufficient to pay the debts of the testator in full without rendering the legatee or devisee liable to restore the property bequeathed or devised, wholly or in part, for the purpose of satisfying the claims of creditors (*t*). Should he do so he may be held answerable to the creditors, in the event of a deficiency of assets, for the value of the property to the bequest or devise of which he has prematurely assented (*u*).

Effect of charge made pursuant to Land Transfer Act, 1897, s. 3 (1).

A charge upon real estate imposed in pursuance of s. 3 (1) of the Land Transfer Act, 1897 (*x*), comes into operation immediately with the assent or conveyance, and if made in the terms of the sub-section, will comprise all debts of which the personal representative has notice at the time of the assent or conveyance in addition to all debts from liability in respect of which the personal representative is not protected by the provisions of s. 29 of Lord St. Leonards' Act (*y*). But such a charge will not apply to debts of which the personal representative has no notice at the date of the assent or conveyance where previously thereto he has

(*s*) *Chamberlain* v. *Chamberlain*, 1 Ch. Ca. 257.

(*t*) *Duke of Devon* v. *Atkins*, 2 P. Wms. 383. See Shep. Touch. (ed. Preston), p. 455; Wentw. Off. Ex. (14th ed.). p. 412.

(*u*) *Spode* v. *Smith*, 3 Russ. 511.

(*x*) 60 & 61 Vict. c. 65, set out *ante*, p. 408.

(*y*) 22 & 23 Vict. c. 35. As to the protection afforded by this statute see *post*, p. 452.

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duly complied with the regulations as to advertisements contained in the last-mentioned section (*z*).

Assent may be express or implied.

The assent of an executor may be express or implied. An express assent may be in writing or parol, and since an assent merely perfects and does not create the interest of the legatee or devisee, the law does not prescribe any particular form in which it must be given (*a*). The Land Transfer Act, 1897, does not prescribe any form for an executor's assent to a devise, except for the purpose of obtaining registration (*b*), nor does it require an assent to a devise to be in writing.

An assent may be implied from any expression or act on the part of the executor clearly indicating his consent to the legatee or devisee taking possession of the property bequeathed or devised to him (*c*).

Implication of assent from informal expressions.

Very slight and informal expressions, if sufficiently clear to indicate intention, have been construed as assents to the taking of legacies, as, for instance, the following: "I intend you to have your legacy according to the devise" (*d*); "The legacy is ready for you whenever you will call for it" (*e*).

Implication from acts of executors.

Where an executor allowed the legatee of a term to receive the rents and profits, his assent to the bequest might be implied (*f*); so, also, where the executor for several years paid the rent of leaseholds and charged the legatee with the payment in account (*g*); and where the executor applied the rents of leaseholds for the

(*z*) *Re Cary and Lott's Contract*, [1901] 2 Ch. 463.

(*a*) Byth. & Jarm. Conv. (4th ed.), vol. i., p. 176.

(*b*) See s. 3 (3) of the Act. The prescribed form is given in the First Schedule to the Land Transfer Rules, 1903, Form 51.

(*c*) See Swinb. (7th ed.), pp. 41 *et seq.*

(*d*) See *Doe* v. *Tatchell*, 3 B. & Ad. 675; *Barnard* v. *Pumfret*, 5 My. & C. 70. See also Com. Dig. (5th ed.) Admon. C. 6.

(*e*) *Hawkes* v. *Saunders*, Cowp. 293. See *Barnard* v. *Pumfret*, *supra*.

(*f*) Wentw. Off. Ex. (14th ed.), p. 414.

(*g*) *Doe* v. *Maberley*, 6 C. & P. 126. See *Thorne* v. *Thorne*, [1893] 3 Ch. 196.

maintenance of the legatee during minority in accordance with a proviso in that behalf contained in the will, he was held to have assented to the bequest of the corpus (*h*).

Purchasers, etc., entitled to evidence of assent.

An obvious result of the provisions of the Land Transfer Act, 1897, in vesting the real estate of a deceased person in his real representatives until they assent to a devise thereof or convey the property devised to the devisee, is to render it necessary, on any subsequent dealing with such property by the devisee, for a purchaser or mortgagee to require satisfactory evidence that the personal representatives of the testator have assented to the devise. In general, unless there is a conveyance to the devisee or an instrument expressly declaring assent to the devise, the personal representatives should be required to testify their assent by concurring in the purchase deed or mortgage, and to confirm the same (*i*).

Written assent advisable.

It will therefore generally be advisable that there should be a deed or instrument in writing declaring the assent of the executor to the bequest of a term of years or of a freehold interest in lands, in order that documentary proof of assent may be forthcoming upon any subsequent dealing with the property (*k*). Such a deed or instrument of assent need not, however, describe the land devised in more precise terms than those comprised in the will (*l*).

Presumption of assent after lapse of time.

A title depending upon a conveyance by a devisee at a remote period may, no doubt, be safely accepted by a purchaser without requiring strict evidence of the assent of the personal representatives to the devise; for, in transactions which have happened at a remote

(*h*) *Paramour* v. *Yardley*, Plowd. 539.
(*i*) Prest. Abstr. (2nd ed.), vol. iii., p. 145.
(*k*) Shep. Touch. (ed. Preston), p. 455
(*l*) *Re Pix, Plomley* v. *Stileman*, [1901 W. N. 165.

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date, the rule obtains that "*ex diuturnitate temporis omnia præsumuntur solemniter esse acta*" (*m*); and, accordingly, it would be presumed that the real representatives had done that which it was their duty to do.

So also if a devisee entered into possession and retains the same for several years without interuption, it would be presumed, in the absence of evidence to the contrary, that the personal representatives had assented to the devise (*o*). And after the death of an executor, after the debts are paid, his assent may be presumed (*p*).

But where a legatee of leaseholds entered into possession without any express assent of the executors, and shortly afterwards quitted possession, it was left to the jury to say whether there was sufficient evidence of assent, and whether a contract by the legatee to grant an underlease was to be presumed to have been entered into by him as owner of the term of years, or as agent of the executors (*q*).

Assent or no assent is question for jury.

It would seem that the question whether or not there is sufficient evidence of assent, in the absence of any express and clear declaration of assent, is one of fact for the jury to determine, even though it depend "on a careful and somewhat critical comparison of the terms of a deed with other circumstances and facts of the case" (*r*).

Assent must be absolute and unconditional.

An assent must generally be absolute and not clogged with any condition subsequent; though it would seem

(*m*) Co. Litt. 6 b.

(*o*) Prest. Abstr. (2nd ed.), vol. iii., p. 145. See *Cole* v. *Miles*, 10 Hare, 179.

(*p*) *Cray* v. *Willis*, 2 P. Wms. 531.

(*q*) *Richardson* v. *Gifford*, 1 A. & E. 52; 3 Nev. & M. 325.

(*r*) *Per* ALDERSON, B., in *Mason* v. *Farnell*, 12 M. & W., at p. 682.

that a representative may agree to give his assent upon the performance of a condition precedent. If an assent is given on the terms that the legatee or devisee shall thereafter do or abstain from any act, the condition will be rejected, and the assent will be deemed to have been given absolutely (*s*). And it would seem that if an assent were to be given upon condition that the same should be void unless the legatee or devisee should do or abstain from a specified act, and if upon default the representative should obtain a reconveyance from the legatee or devisee, such reconveyance would be liable to be set aside (*t*). An assent under the Act of 1897 may, however, be given subject to a charge of any moneys payable by the personal representatives (*u*).

Assent to partial interests.

An assent to a life interest in a legacy is an assent to the interest or interests in remainder (*x*); and conversely, an assent to an interest in remainder, will enure to the benefit of all prior takers (*y*).

So, where a testator bequeathed the clear rental of a leasehold house to his wife for life, and after her decease to his son, and after his decease to his children equally, with remainders over in default of issue, the executors proved the will and paid the rents to the widow during her life, and after her death to the son during his life, it was held that the assent of the executors to the life estates was an assent to the estates in remainder (*z*).

So, now, if a testator devises real estate in strict settlement, or to several persons by way of remainders, the assent of the real representatives to the entry of

(*s*) Wentw. Off. Ex. (14th ed.), p. 429.

(*t*) *Westwick* v. *Wyer*, 4 Rep. 28 b. See Com. Dig. (5th ed.), Admon. C. 8.

(*u*) *Supra*, p. 411. (*x*) Wentw. Off. Ex. (14th ed.), p. 426.

(*y*) Com. Dig. (5th ed.) Admon. C. 6.

(*z*) *Stevenson* v. *Mayor of Liverpool*, L. R. 10 Q. B. 81. See *Adams* v. *Peirce*, 3 P. Wms. 12.

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the first tenant for life on the property will be deemed to be impliedly an assent to the devise as regards the estates in remainder. And, conversely, their assent to the devise of any one estate in remainder will entitle the first tenant for life to enter on the land, and enure to the benefit of all other persons entitled in remainder for the several estates of the devisees, constituting the whole but one estate.

Assent to gift is assent to annexed condition.

An assent to a bequest or devise is an assent to a condition, or a contingency annexed to the bequest or devise. So, where a term of years was bequeathed to an executor for his life, he paying to A. the sum of £50, with remainder to B., payment by the executor of the £50 to A. will be a sufficient assent to the devise of the remainder to B. (*a*).

Entry by personal representative on land not proof of assent to gift to him.

Where, however, a personal representative enters on land, he must have been taken to have entered as such, and not as beneficiary, unless there be other evidence of his assent to the gift; and the rule is the same whether the beneficiary is sole representative or one of several representatives. If, therefore, the representative having entered on the land, does only acts which are equally applicable or inapplicable to his title as beneficiary as to his character as representative, he will be presumed to have acted only in his character of representative. But if his dealings with the property are inconsistent with the duty of a real representative, his assent to the gift will be presumed (*b*).

So, where a life interest in furniture was given to an executrix, her taking possession of the goods was held to be no assent to the gift in remainder (*c*).

(*a*) *Young* v. *Holmes*, 1 Str. 70.

(*b*) *Doe* v. *Sturges*, 7 Taun. 217.

(*c*) *Richards* v. *Browne*, 3 Bing. (N.S.) 493. See *Trail* v. *Bull*, 22 L. J. Ch. 1082. See further as to what acts of an executor will or will not be deemed to amount to an assent to his own legacy, Wms. Ex. (10th ed.), vol. ii., pp. 1109 *et seq.*, and cases there cited.

Assent of one representative when sufficient.

Where there are several personal representatives, the assent of one or more to a bequest of personalty is sufficient (*d*); but inasmuch as an assent to a devise obviously operates as a transfer of real estate, it seems clear that the concurrence of all the personal representatives will be necessary unless the sanction of the Court to an assent by one or some only of them is obtained (*e*). On the death of one of them, the power to give assent to a devise will, as it is conceived, devolve on the survivors or survivor, in like manner as it does with respect to a bequest of personalty (*f*).

If leasehold land be bequeathed to one of several personal representatives, he may assent to the bequest without the assent or concurrence of the other personal representatives and retain the land accordingly (*g*); and it would seem that he may give such assent although he have not previously acted in the administration (*h*). But it would seem that, as an assent to a devise of real estate would operate as a transfer to the devisee, the assent of all the personal representatives will be necessary to a devise to one of them.

Infant cannot assent.

A personal representative who is an infant cannot, of course, assent to a gift until he attains full age; but his administrators *durante minore ætate* may assent on his behalf (*i*).

Assent of married woman.

A married woman who is a personal representative, may, apparently, assent to devises of real estate, as

(*d*) *Holkirk* v. *Holkirk*, 4 Madd. 51; *Worthington* v. *Evans*, 1 S. & S. 165; *Cole* v. *Miles*, 10 Hare, 179.

(*e*) 60 & 61 Vict. c. 65, s. 2 (2). See *ante*, p. 186.

(*f*) *Flanders* v. *Clarke*, 3 Atk. 510.

(*g*) *Townson* v. *Tickell*, 3 B. & A. 40.

(*h*) Perkins' Profitable Book (15th ed.), s. 572.

(*i*) *Prince's Case*, 5 Rep. 29 b; *Anon.*, 1 Freem. 288.

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well as convey real estate vested in her as administratrix, without the consent or concurrence of her husband (*k*).

Assent before probate.

It would seem that an executor may assent to a gift before probate (*l*); and that the death of a personal representative in the meantime will not affect the validity of such assent, although until probate or grant of letters of administration *cum testamento annexo*, the will is not admissible as evidence (*m*).

It has sometimes been thought that, inasmuch as an executor may assent before probate, the vendor of lands acquired by testamentary disposition can make a good title without probate, and that the purchaser is not entitled to require the will to be proved (*n*), but it is submitted that such a proposition cannot be sustained.

Probate necessary to complete title.

Unless the will is proved there will be a defect in the title of the devisee which may prove inconvenient when he desires to deal with the property. The assent or conveyance will be good so far as it goes for purposes of title, but there will be no legal evidence that the person purporting to give the assent or to make the conveyance had any power to do so. As soon as the probate has been obtained, this defect in evidence will be supplied, and the claim of title will be perfected accordingly (*o*).

The will may be proved at any time, even after the death of the executor; and, on this being done, a previous assent or conveyance will be admissible in

(*k*) See *ante*, p. 409.

(*l*) Went. Off. Ex. (14th ed.), p. 82.

(*m*) *R.* v. *Stone*, 6 T. R. 298; *Pinney* v. *Pinney*, 8 B. & C. 335; *Brazier* v. *Hudson*, 8 Sim. 67; *Fenton* v. *Clegg*, 9 Exch. 680.

(*n*) See Dyer, 367 a.

(*o*) Prest. Abstr. (2nd ed.), vol. iii., p. 147.

evidence, so that the devisee will be enabled to make a good title to a purchaser or mortgagee, by deducing the same from the deceased owner through his personal representatives (*p*).

Conveyance before grant of administration.

Although a conveyance to the heir by a person who at the time of the conveyance is an executor *de son tort* merely, must necessarily be ineffectual until letters of administration have been granted, it would seem that upon a subsequent grant to the executor *de son tort* the title of the heir under the conveyance will be made good by relation, provided the conveyance were made in due course of administration and for the benefit of the estate (*q*).

An executor may be compelled by a legatee to assent to a legacy, if he should refuse to do so without just cause (*r*).

This principle is now applied to real estate, the right to recover which, subject to requirements for purposes of administration, is given to a devisee or heir, by s. 3 (2) of the Land Transfer Act, 1897 (*rr*), which enacts as follows:

Jurisdiction of Court to order conveyances.

> "At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives."

(*p*) Prest. Abstr. (2nd ed.), vol. iii., pp. 146, 147.

(*q*) See *ante*, pp. 51, 52.

(*r*) Wentw. Off. Ex. (14th ed.), p. 70; Com. Dig. (5th ed.) Admon. C. 8. See as to refusal of executor to distribute, *ante*, p. 395.

(*rr*) 60 & 61 Vict. c. 65.

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Liability of representatives refusing to convey.

It has been seen that this Act expressly declares that the personal representatives of a deceased owner of land are to be deemed to be trustees for the persons at law beneficially entitled thereto (*s*). It is a well settled rule with regard to trustees, that, when they have no longer any active duty to perform because their trust has been fully performed, it is their duty to convey or transfer the trust property to the persons beneficially entitled thereto or as they direct, and if they refuse to do so without good reason they will be liable to pay the costs of an action to compel conveyance or transfer (*t*).

Where, however, an executor had failed upon request made pursuant to the above sub-section to convey land to a devisee, but, before service upon him of a summons to compel conveyance, sent a written assent to the devisee, the summons, on being brought to a hearing, was dismissed with costs (*u*).

Where an action to compel assent or conveyance is brought against a personal representative, the indorsement must show that he is being sued in a representative capacity (*x*).

Right of purchasers from devisee or heir before assent or conveyance.

If the beneficiary has conveyed real estate to which he is entitled subject to the requirements of administration, before the assent of the personal representatives or conveyance of the property by them to him, then, upon completion of the administration, the purchaser from the beneficiary will be entitled to call upon the personal representatives to convey to him the legal

(*s*) *Ante*, pp. 86, 87.

(*t*) *Payne* v. *Barker*, Bridg. 24; *Jones* v *Lewis*, 1 Cox C. C. 199; *Willis* v. *Hiscox*, 4 My. & C. 197; *Hampshire* v. *Bradley*, 2 Coll. 34.

(*u*) *Re Pix*, *Plomley* v. *Stileman*, [1901] W. N. 165.

(*x*) R. S. C., Order III., r. 4; App. A., Part III., s. 7.

estate, and a refusal to do so may render them liable to costs (*y*). It would seem that the purchaser may bring an action in such case to compel a conveyance by the real representatives without making the beneficiary vendor a party (*z*).

Married woman.

A married woman beneficially entitled to her separate use, and not restrained from anticipation, may compel the personal representatives to convey to herself or her husband (*a*).

Grounds on which personal representatives may refuse to convey.

Of course the personal representative will be entitled to refuse to assent to a devise or to convey the property if he can show that retention of the property is necessary to enable him to provide for the discharge of debts or liabilities of the deceased which are paramount to the claims of the devisee or heir (*b*).

A personal representative, like a trustee, may also refuse to assent or convey if, upon the face of the will, the title of the claimant is doubtful (*c*); and the fact that in refusing, he has acted under the advice of counsel, even though mistaken, may induce the Court to absolve him from payment of costs (*d*).

Stamp duty.

A deed of conveyance from the personal representative to the heir or devisee, or an assent to a devise, if given by deed, will require a stamp of 10*s*. as a deed not otherwise charged (*e*); but an assent given under

(*y*) *Angier* v. *Stannard*, 3 My. & K. 566.

(*z*) *Goodson* v. *Ellisson*, 3 Russ. 583; *Holford* v. *Phipps*, 3 Beav. 434; 4 Beav. 475.

(*a*) *Thorby* v. *Yeats*, 1 Y. & C. C. C. 438. The restraint only applies during coverture. See *Buttanshaw* v. *Martin*, Johns. 89.

(*b*) *Chaffe* v. *Kelland*, 1 Roll. Abr. 929, tit. Executors (A.), pl. 1; *Elwell* v. *Quash*, 1 Stra. 20. See Wentw. Off. Ex. (14th ed.), p. 212.

(*c*) *Angier* v. *Stannard*, *supra*. See *Devey* v. *Thornton*, 9 Hare, 232; *Re Cull's Trust*, L. R. 20 Eq. 561.

(*d*) *Stott* v. *Milne*, 25 Ch. D. 710.

(*e*) 54 & 55 Vict. c. 39, Sched. Even if the assent or conveyance is made under s. 3 (1) of the Act of 1897, "subject to a charge for the

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hand only, though subject to a charge for the payment of any money which the personal representative is liable to pay, is not liable to stamp duty as a conveyance or transfer (*f*).

payment of any money which the personal representatives are liable to pay," it is conceived that a stamp of 10*s.* will be sufficient. The instrument creates no new charge; it merely affirms the continuance, in the hands of the devisee or heir, of the liability of the real estate as assets for payment of the deceased owner's debts.

(*f*) *Kemp* v. *Commissioners of Inland Revenue*, [1905] 1 K. B. 581.

PART IV.

OF THE LIABILITY OF THE PERSONAL REPRESENTATIVE.

CHAPTER XVIII.

OF THE LIABILITY OF THE REPRESENTATIVE UPON CONTRACT AND TORT.

SECTION I.

Of Contracts Entered into and Torts Committed by the Deceased.

Actions founded on contract survive against representative.

It is a long established rule that personal claims which are founded upon any obligation under a contract, bond, or covenant, or upon any debt or duty which might have been enforced by suing a testator or intestate in his lifetime, are in like manner enforceable, to the extent of the assets, against his personal representative (*a*). And for this purpose it is immaterial whether the representative be named in the instrument creating the obligation or not (*b*).

At common law, indeed, there were formerly some forms of actions upon contract which did not survive as against executors or administrators, but other actions

(*a*) Shep. Touch. (ed. Preston), p. 482.

(*b*) Wentw. Off. Ex. (14th ed.), p. 239; Com. Dig. (5th ed.), Admon. B. 14.

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have been substituted for these (*c*); and it is now established that "where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator by the work and labour or property of another, the action survives against the executor" (*d*).

Liability for debts.

With regard to "money due," it has already been shown that the representative is answerable, to the extent of the assets, for all debts due from the deceased whether by judgment or recognizance, by specialty, or by simple contract (*e*).

Bar of debt by lapse of time. Acknowledgment by representative.

A debt due from the estate is, of course, liable to become barred by lapse of time under the Statutes of Limitation (*f*). And although an acknowledgment by an executor or administrator, within those statutes, is sufficient to keep alive the remedy of the creditor as against the personal estate of the deceased, it has hitherto been held that such an acknowledgment is not sufficient to keep alive the remedy as against the real estate descended or devised (*g*) even though the executor himself were devisee in trust of the real estate (*h*). The ground of this distinction has been that an acknowledgment by an executor *quâ* executor cannot prejudicially affect property to which he has no title or to which he claims title in another capacity (*i*). The question arises whether the provisions of the Land Transfer Act, 1897 (*k*), have made any difference in this

(*c*) Toller (7th ed.), p. 460.

(*d*) *Per* Lord MANSFIELD in *Hambly* v. *Trott*, 1 Cowp. 375; *Phillips* v. *Homfray*, 24 Ch. D. 439, 468 [C. A.]; *Batthyany* v. *Walford*, 36 Ch. D. 269 [C. A.].

(*e*) *Ante*, Chap. IX.

(*f*) 21 Jac. 1, c. 16; 3 & 4 Will. 4, c. 42. See *Re Greaves*, *Bray* v. *Tofield*, 18 Ch. D. 551; *Re Baker*, *Collins* v. *Rhodes*, 20 Ch. D. 230, [C. A.].

(*g*) *Putnam* v. *Bates*, 3 Russ. 188; *Fordham* v. *Wallis*, 10 Hare, 217; *Coope* v. *Cresswell*, L. R. 2 Ch. App. 112.

(*h*) *Fordham* v. *Wallis*, *supra*.

(*i*) See *Fordham* v. *Wallis*, *supra*, at pp. 228, 230; *Astbury* v. *Astbury*, [1898] 2 Ch. 111.

(*k*) 60 & 61 Vict. c. 65.

respect. In *Re Lacey, Howard* v. *Lightfoot* (*l*), where it was held that payment of interest by the specific devisee of part of a testator's real estate which was subject to a mortgage created by the testator, was sufficient to keep the mortgagee's right of action alive against the specific devisee of another part of the real estate not subject to the mortgage, FARWELL, L.J., explains the nature of the joint liability of devisees and of heir and devisee under the Statutes, 3 Will. & Mary, c. 14, and 11 Geo. 4, and 1 Will. 4, c. 47, and the distinction between the remedy against heir or devisee on the one hand, and against the executor on the other hand, in respect of debts due from the testator's estate. Inasmuch as the Land Transfer Act, 1897, appears to have conferred upon creditors no new remedy by action at law against the personal representative, although its effect may have been to suspend the remedy by action at law against the heir and devisee until conveyance or assent by the personal representative (*m*), it would seem that the personal representative is not a person standing in equal peril of suit with the heir and devisee in respect of any debt due from the estate, and consequently that acknowledgment or part payment by him will have no other or further effect now than formerly.

Acknowledgment by one of several representatives.

An acknowledgment of a debt within Lord Tenterden's Act (*n*), made by one of several executors as executor, will bind the testator's estate (*o*); but in accordance with the distinction above referred to, an acknowledgment by one of two executors and devisees in trust of real estate that more than six years' interest was due upon a mortgage created by their testator, made against the wishes of the other executor and trustee in a case not falling within the operation of the Land Transfer Act, 1897, was held insufficient to prevent the

(*l*) [1907] 1 Ch. 330.
(*m*) *Ante*, p. 124.
(*n*) 9 Geo. 4, c. 14, s. 1.
(*o*) *Re Macdonald, Dick* v. *Fraser*, [1897] 2 Ch. 181.

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statute 3 & 4 Will. 4, c. 27, s. 42, from operating as against the real estate (*p*).

Contracts of suretyship.

The personal representative is liable to discharge out of the assets all liabilities which may accrue due upon "contracts to be performed" by the deceased. Contracts of suretyship sometimes afford instances of liabilities thus arising. In the case of a continuing guarantee the consideration for which is "fragmentary, supplied from time to time and therefore divisible," the operation of the guarantee as to future transactions may be determined by notice without any express stipulation to that effect. In the case of a guarantee of this kind determinable by the surety in his lifetime, whether by inference or by express stipulation to that effect, notice of the death of the surety given by the surety's representatives is, as a general rule, sufficient notice to determine the guarantee (*q*); but if there be contained in the guarantee an express stipulation as to the determination thereof by notice, and such stipulation extend in terms to the representatives of the surety, it must be strictly observed by them (*r*). Where the consideration for a guarantee is entire, as where a bond is given to secure the due performance of the duties of an office or of the covenants of a lease, neither the death of the surety nor the fact of his death coming to the knowledge of the obligee is sufficient, apart from express stipulation, to determine the guarantee (*s*).

Calls upon shares.

Upon the same principle, calls upon shares in any company of which the deceased was a member must be paid out of the assets if made within the time during

(*p*) *Astbury* v. *Astbury*, [1898] 2 Ch. 111. See *Re Lacey*, *Howard* v. *Lightfoot*, [1907] 1 Ch. 330, 344.

(*q*) *Coulthart* v. *Clementson*, 5 Q. B. D. 42; *Lloyds* v. *Harper*, 16 Ch. D. 290, 319 [C. A.].

(*r*) *Re Silvester*, *Midland Rail. Co.* v. *Silvester*, [1895] 1 Ch. 573.

(*s*) *Calvert* v. *Gordon*, 3 Man. & R. 124; *Lloyds* v. *Harper*, *supra*; *Re Grace*, *Balfour* v. *Grace*, [1902] 1 Ch. 733.

which the law regards the membership of the deceased as subsisting for the purpose of the articles of association; that is to say, so long as the deceased's name remains on the register without notice to the company of his death (*t*). "It is the duty of the representatives of a deceased member to give notice of his death to the company at the earliest possible opportunity, and if they wish the company not to go on treating him as still on the books, it is the duty of the executors to give notice to the company of their desire to become members in his place" (*u*).

Rent and damages for breach of covenant.

So, again, the representative of a deceased lessee must discharge out of the assets rent becoming due upon the lease and any damages for breaches of covenant contained in the lease (*x*); and, conversely, the representative of a deceased lessor is liable to the extent of the assets for breaches of covenant for title. Thus, if a limited owner leases settled land for a term in excess of his powers of leasing, and after his death the remainderman ejects the lessee, the representative of the lessor will be liable to the lessee upon the covenant for quiet enjoyment (*y*), unless restricted to the acts of the lessor and those claiming under him (*z*). So now, it would seem, the personal representative of a deceased owner of real estate will be liable to the extent of the assets for all breaches of covenant relating thereto.

(*t*) 25 & 26 Vict. c. 89, ss. 76, 105. See *Taylor* v. *Taylor*, L. R. 10 Eq. 477; *Baird's Case*, L. R. 5 Ch. App. 725; *New Zealand Gold Extraction Co.* v. *Peacock*, [1894] 1 Q. B. 622 [C. A.].

(*u*) *Per* DAVEY, L.J., in *New Zealand Gold Extraction Co.* v. *Peacock*, *supra*, at p. 632. See as to the personal liability of the representative in respect of shares, *ante*, pp. 94, 176.

(*x*) *Coghill* v. *Freelove*, 3 Mod. 326; *Rendall* v. *Andreae*, 61 L. J. Q. B. 630. See as to the personal liability of the representative as assignee after entry in respect of leasehold property, *ante*, p. 96, and in respect of real estate, *ante*, p. 99.

(*y*) Wentw. Off. Ex. (14th ed.), p. 252.

(*z*) *Pease* v. *Courtney*, [1904] 2 Ch. 503, 512.

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Breaches of trust.

The personal representative will also be liable, to the extent of the assets, in respect of any act of the deceased which, not being a mere tort, amounts to a breach of a *quasi* contract, as where the claim is founded on breach of a fiduciary relation or on failure to perform a duty (*a*). Thus, where a director of a company was liable to contribute to the assets of the company in respect of a breach of trust, it was held that upon his death the liability to contribute survived against his estate (*b*). So where a solicitor had, in breach of trust, retained trust moneys in his own hands and died, his representative was held liable to make good out of the assets the amount so retained with interest at four per cent. (*c*).

Action for administration.

The usual method of enforcing payment of a debt due from the estate is by means of an action or summons in the Chancery Division for the administration of the estate. An order for general administration was formerly obtainable at the instance of any person interested in the residuary estate *ex debito justitiæ*, but will now be made at the risk, as to costs, of the party claiming the order, if it subsequently appear that there is no substantial question to be tried rendering a general order for administration necessary (*d*).

If the representative admit assets, an immediate order for payment will be made (*e*); if not, an order for administration (*f*).

Action for debt.

In his representative character an executor or administrator is also liable, at the instance of any creditor, to

(*a*) *Concha* v. *Murrieta*, 40 Ch. D. 543, 553 [C. A.].

(*b*) *Ramskill* v. *Edwards*, 31 Ch. D. 100. And see *Re Sharpe*, [1892] 1 Ch. 154 [C. A.].

(*c*) *Soar* v. *Ashwell*, [1893] 2 Q. B. 390 [C. A.].

(*d*) R. S. C., Order LV., r. 10; Order LXV., r. 1; *Re Blake*, *Jones* v. *Blake*, 29 Ch. D. 913 [C. A.].

(*e*) *Woodgate* v. *Field*, 2 Hare, 211.

(*f*) See *Soar* v. *Ashwell*, *supra*, at p. 406 [C. A.]; *Re Powers*, *Lindsell* v. *Phillips*, 30 Ch. D. 291 [C. A.].

a common law action of debt in respect of legal assets; and judgment *de bonis testatoris* or *intestati* recovered in such action, besides entitling the creditor to priority in payment over other creditors of the same class who have not recovered judgment (*g*), may be made the foundation of proceedings at law against the personal representative for recovery of the debt *de bonis propriis* (*h*).

To an action of debt brought against him in his representative capacity the representative may plead that there are no assets available for the payment of the debt, and in that case it is open to the plaintiff either to apply under Order XXXII., r. 6, to have judgment for his debt and costs out of assets *quando acciderint*, or to join issue with the representative upon his defence, and to obtain judgment to the extent of the assets proved against him and of future assets *quando acciderint* for the residue of his debt (*i*).

If issue be joined upon the defence, the representative must put in evidence all dealings with the assets in payment of, or provision for debts, whereby the assets have become insufficient to answer the plaintiff's claim, and if he fail to do so, will not afterwards be allowed in an action suggesting a *devastavit* brought upon the judgment to set up as a defence to the *devastavit* any facts which might have been offered in evidence in the original action (*k*).

If the personal representative fail to plead in an action brought against him *de bonis testatoris*, judgment for immediate payment may be obtained and will operate as a conclusive admission on his part that he has sufficient assets to satisfy it (*l*).

(*g*) *Ante*, p. 202.
(*h*) *Post*, p. 441.
(*i*) Bullen and Leake Prec. Plead. (5th ed.), p. 697.
(*k*) *Jewsbury* v. *Mummery*, L. R. 8 C. P. 56.
(*l*) See *Re Marvin*, *Cranter* v. *Marvin*, [1905] 2 Ch. 490.

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Execution.

The goods of the deceased in the hands of the personal representative may still, apparently, be taken in execution under a writ of *fieri facias* taken out upon a judgment *de bonis testatoris* (*m*).

Where leave to issue execution necessary.

Where, however, a creditor has already obtained judgment for his debt against the deceased in his lifetime, leave to issue execution against the personal representative must be obtained under Order XLII., r. 23, of the Rules of the Supreme Court (*n*). In such a case, a creditor will not be entitled to a charging order upon stock under the provisions of the statute 1 & 2 Vict. c. 110 (*o*), but will be left to his remedy of an action for administration (*p*).

The modern practice of obtaining relief in equity by means of an action for administration, has virtually superseded the former practice of instituting proceedings at law upon judgments obtained against the representative (*q*).

Rule at law as to survival of actions founded upon joint contracts.

Where several persons enter into a contract or obligation, and one contractor or obligor dies, then, if the contract or obligation is joint only, the survivor alone remains liable at law, and the executor or administrator of the deceased is discharged from liability (*r*). But if the contract or obligation is joint and several the cause of action will survive against the representative (*s*).

Rule in equity.

In equity it was formerly held that the representative of a deceased joint obligor was liable (*t*). Now, how-

(*m*) See Wms. Ex. (10th ed.), pp. 1597 *et seq.*
(*n*) See *Re Shephard, Atkins* v. *Shephard*, 43 Ch. D. 131 [C. A.].
(*o*) Section 14.
(*p*) *Stewart* v. *Rhodes*, [1900] 1 Ch. 386 [C. A.].
(*q*) *Ibid, per* LINDLEY, M.R., at p. 403.
(*r*) *Godson* v. *Good*, 6 Taunt. 587, 594.
(*s*) *Towers* v. *Moor*, 2 Vern. 99.
(*t*) *Primrose* v. *Bromley*, 1 Atk. 89.

ever, the doctrine is otherwise, and not every joint liability on contract is severed in equity. In order to enable a Court of Equity to give any other than its legal operation to a contract imposing *primâ facie* a joint liability only, the character of the transaction on which the contract was founded must be such that it would naturally imply a several liability (*u*).

Contracts of partners.

Although the liability of partners for the debts and contracts of the partnership is strictly joint, it has long been the rule of Courts of Equity, in the administration of the assets of a deceased partner, in order to administer all the equities existing with regard to them, to treat the liability as both joint and several (*x*). The rule is now confirmed by s. 9 of the Partnership Act, 1890 (*y*), which enacts that:

Liability of partners.

> "Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts."

At the present day, therefore, the personal estate of a deceased partner is liable in the hands of his personal representatives to pay all debts and liabilities of the firm incurred up to the time of his death, and continues so liable until such estate is effectually discharged. The discharge may be effected in equity not only by actual payment, but by subsequent dealings between the creditor and the continuing partners, which show that he has accepted and recognised them as his sole debtors (*z*). But the mere fact that a creditor knowing

Novation of partnership debt.

(*u*) *Sumner* v. *Powell*, 2 Mer. 30.

(*x*) *Sumner* v. *Powell*, *supra*; *Kendall* v. *Hamilton*, 4 App. Cas. 504, 517; *Re Hodgson*, *Beckett* v. *Ramsdale*, 31 Ch. D. 177 [C. A.].

(*y*) 53 & 54 Vict. c. 39.

(*z*) *Bilborough* v. *Holmes*, 5 Ch. D. 255; *Re Head*, *Head* v. *Head* (No. 2), [1894] 2 Ch. 236 [C. A.].

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of the death continues his dealings with the firm, and forbears to sue the surviving partners for his debt, will not be sufficient to discharge the personal representative of the deceased partner from liability (*a*).

Provision as to debts of firm contracted after death of partner.

By s. 36 (3) of the above Act it is provided that the personal representatives of a deceased partner are not liable for debts of the firm incurred after his death; and by s. 14 it is further provided that the continued use of the old firm name, or of the name of a deceased partner as part thereof, shall not of itself make his personal representative liable for any partnership debts contracted after his death.

Specific performance of contracts.

Specific performance of "contracts to be performed" by the deceased may, as a general rule, be enforced against the personal representative (*b*). Thus, where the deceased had prior to his death entered into a binding contract for the purchase of goods, it was held that the representative was bound to receive and pay for them (*c*).

The personal representative is, moreover, bound to take all steps within his power necessary for completion of the deceased's contracts. Thus, where the deceased had entered into a contract for sale of leaseholds subject to the consent of the lessor being obtained, and the personal representative in order to free the estate from the contract, induced the lessor to withhold his consent, the purchaser, in an action brought by him against the representative, was held entitled not only to the return of his deposit with interest and costs of investigating the title, but also to the damages he had sustained by the loss of his bargain through the omission of the defendant to obtain the lessor's consent (*d*).

(*a*) *Re Head, Head* v. *Head* (No. 1), [1893] 3 Ch. 426. See *Scarf* v. *Jardine*, 7 App. Cas. 345.

(*b*) Fry on Specific Performance (4th ed.), p. 88.

(*c*) *Wentworth* v. *Cock*, 10 Ad. & E. 42.

(*d*) *Day* v. *Singleton*, [1899] 2 Ch. 320 [C. A.]. *Cf. Pease* v. *Courtney*, [1904] 2 Ch. 503.

Where contract personal to deceased.

But where the contract is personal to the deceased, and by reason of his death becomes incapable of performance, the personal representative is exempted from any liability in respect of its non-performance (*e*). Thus, in any case in which the contract depended for its performance upon the personal skill or taste of the deceased, as where the deceased had contracted to write a book or to paint a picture, death will discharge the contract (*f*). So, a covenant by a master to instruct an apprentice, is personal to the master, and if he die before the period of apprenticeship has expired, his personal representative will not be liable for the non-performance of the contract (*g*).

Damages in lieu of specific performance.

Where the nature of the contract entered into by the deceased is such that the proper remedy, having regard to the rules of equity relative to the doctrine of specific performance, is an action for damages in lieu of specific performance, the representative will be liable to answer the damages out of the assets. So, where the contract was with a builder for the erection of a house upon the deceased's property, it was held to be the duty of the representative to specifically perform the contract (*h*).

Actions founded upon tort do not as a rule survive.

With regard to liabilities of the deceased in respect of wrongful acts done by him against the person or property of another, the rule at common law was, and subject to slight statutory modifications still is, that an executor or administrator shall not be charged for any personal wrong done by the deceased (*i*). As a general rule, therefore, no action founded upon tort can be brought against the personal representative, and

(*e*) *Siboni* v. *Kirkman*, 1 M. & W. 423.

(*f*) *Marshall* v. *Broadhurst*, 1 Tyrw. 349; *Stubbs* v. *Holywell Rail. Co.*, L. R. 2 Ex. 311.

(*g*) *Baxter* v. *Burfield*, 2 Stra. 1266.

(*h*) *Cooper* v. *Jarman*, L. R. 3 Eq. 98.

(*i*) Shep. Touch. (ed. Preston), p. 484.

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any such action, as for battery, false imprisonment, trespass, slander, nuisance, diverting a watercourse, escape, and other similar causes of action, die with the person in accordance with the maxim "*actio personalis moritur cum personâ*" (*k*).

Value of benefit accrued from wrong done may be recovered.

But though damages for injury done by the deceased cannot be recovered against the personal representative, yet if the estate of the deceased has been benefited by the wrong done, the amount or value of such benefit may be ascertained and recovered from the personal representative out of the estate (*l*). So, if a person wrongfully converts to his own use the goods of another and dies, the executor or administrator, though not liable in damages for the wrong done, is liable to restore the goods if still in specie, or to refund their value, if they have been sold, to the rightful owner (*m*).

Actions in respect of wrongs to property.

With regard to wrongs done by the deceased to the property of another, it is now provided in effect that actions may be brought against executors or administrators for any injury to property real or personal, committed by the deceased, provided that the injury was committed within six months of his death (*n*), and that the action is brought within six months after the personal representative has assumed the administration of the estate (*o*); and that damages are to be payable on the footing of a simple contract debt (*p*).

(*k*) *Hambly* v. *Trott*, Cowp. 375. See *Finlay* v. *Chirney*, 20 Q. B. D. 494 [C. A.].

(*l*) *Phillips* v. *Homfray*, 24 Ch. D. 439 [C. A.]; *Re Duncan, Terry* v. *Sweeting*, [1899] 1 Ch. 387.

(*m*) *Hambly* v. *Trott*, *supra*; *Phillips* v. *Homfray*, *supra*, and cases there cited.

(*n*) See, as to continuing wrongs, *Woodhouse* v. *Walker*, 5 Q. B. D. 404; *Jenks* v. *Viscount Clifden*, [1897] 1 Ch. 694.

(*o*) *Erskine* v. *Adeane*, L. R. 8 Ch. App. 756.

(*p*) 3 & 4 Will. 4, c. 42, s. 2.

SECTION II.

OF CONTRACTS ENTERED INTO AND TORTS COMMITTED BY THE REPRESENTATIVE.

Promise by representative to pay debts of the deceased.

Although not personally liable by virtue of his office to answer the debts of the deceased out of his own estate, the personal representative may yet render himself so liable upon his own promise to pay; and judgment recovered thereon will be *de bonis propriis* (*q*).

In order to have the effect of binding him personally, the personal representative's promise to pay must be founded on an admission of assets sufficient to satisfy the debt. Where there is consideration moving from the creditor, such as forbearance on his part to sue for the debt (*r*), or compliance with the request of the personal representative to account on the strength of the promise to pay (*s*), the personal representative will be precluded from denying that he has assets sufficient to satisfy the debt which he has promised to pay; and the rule may be stated generally that if a personal representative promise to pay a debt of the deceased in consideration of assets come to his hands, or of forbearance on the part of the creditor to sue, or if the promise in any way implies an admission of assets, he will become personally liable to pay the debt (*t*); provided the promise be made in writing in accordance with the provisions of the Statute of Frauds to that effect. But a promise to pay, which does not imply an admission of assets is *nudum pactum* and subjects the personal representative to no personal liability (*u*).

(*q*) See Swinb. (7th ed.), p. 712, and see cases cited *infra*.

(*r*) *Keech* v. *Kennegal*, 1 Ves. 124. See *Scott* v. *Stephenson*, 1 Lev. 71.

(*s*) *Haws* v. *Smith*, 2 Lev. 122.

(*t*) *Keech* v. *Kennegal*, *supra*; *Hawkes* v. *Saunders*, Cowp. 289, and cases there cited; *Rann* v. *Hughes*, 7 T. R. 350 n.

(*u*) *Pearson* v. *Henry*, 5 T. R. 6; *Keech* v. *Kennegal*, *supra*; *Rann* v. *Hughes*, *supra*.

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Statute of Frauds.

By s. 4 of the Statutes of Frauds (*x*) it is enacted that:

> ". . . no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate . . . unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

Contracts entered into by representative on behalf of the estate.

In a former chapter it has been shown that a personal representative has power, and is sometimes bound to take upon himself the management of the estate of his deceased testator or intestate, and so to do whatever is essential to the completion of the deceased's undertakings, including the carrying on of his business, if any, with a view to a sale (*y*). In the performance of this duty the representative will render himself personally liable to those with whom he deals (*z*), notwithstanding that he avowedly contracts as representative (*a*).

Right to indemnity.

In respect, however, of all liabilities properly incurred by him, the representative will be entitled to be indemnified out of the assets (*b*); and to the extent of his right of indemnity, creditors whose debts have arisen in the course of the representative's management of the estate, will be entitled to stand in his place as against the estate (*c*). Where one of several representatives

(*x*) 29 Car. 2, c. 3. See also 19 & 20 Vict. c. 97, s. 3.

(*y*) *Ante*, p. 159.

(*z*) *Corner* v. *Shew*, 3 M. & W. 350; *Ex parte Garland*, 10 Ves. 110; *Owen* v. *Delamere*, L. R. 15 Eq. 134; *Fairland* v. *Percy*, L. R. 3 P. & D. 217; *Farhall* v. *Farhall*, L. R. 7 Ch. App. 123, 128; *Re Johnson*, *Shearman* v. *Robinson*, 15 Ch. D. 548 [C. A.].

(*a*) *Labouchere* v. *Tupper*, 11 Moo. P. C. 198.

(*b*) *Ex parte Garland*, *supra*; *Re Evans*, *Evans* v. *Evans*, 34 Ch. D. 597, 600 [C. A.]; *Moore* v. *M'Glynn*, [1904] 1 I. R. 334.

(*c*) *Ex parte Edmonds*, 4 De G. F. & J. 488; *Re Johnson*, *Shearman* v. *Robinson*, *supra*; *Strickland* v. *Symons*, 26 Ch. D. 245 [C. A.]; *Re Evans*, *Evans* v. *Evans*, *supra*; *Re Kidd*, W. N. (1894) 73; *Moore* v. *M'Glynn*, *supra*.

acting in the management of the estate has made default, the right remains in each of the others, whose accounts are clear, to insist on his own indemnity, unless, indeed, he be responsible for the representative in default. In such a case, accordingly, creditors whose debts have been incurred in the course of management are nevertheless entitled to rank against the trust estate by subrogation to the equities so remaining (*d*).

Extent of right as against creditors.

The representative's right of indemnity as against creditors in regard to the continuance by him of the deceased's business is, as a general rule, limited to liabilities incurred by him in carrying on the business for such reasonable time only as may be necessary to enable him to sell the business property as a going concern (*e*); but where the business has been carried on by him at the instance of the creditors without regard to the terms of the will the representative has the ordinary right of an agent against his principal. He will be entitled as against the creditors to a general indemnity out of the whole of the testator's estate, and not merely out of such part of the estate as may have been acquired by him since the testator's death (*f*).

Extent of right as against beneficiaries.

Where a business has been carried on by the representative under an authority in that behalf contained in the will, and not expressly or impliedly limiting the amount of the assets to be employed by him in the business, he will be entitled to a general indemnity out of the estate as against all persons claiming under the will (*g*). But where the testator has by his will expressly limited the amount of the assets to be employed by the representative in the business, the latter's right of indemnity will be confined to the

(*d*) *Re Frith, Newton* v. *Rolfe*, [1902] 1 Ch. 342.
(*e*) *Dowse* v. *Gorton*, [1891] A. C. 190, 199.
(*f*) *Ibid.; Re Brooke, Brooke* v. *Brooke*, [1894] 2 Ch. 600.
(*g*) *Dowse* v. *Gorton, supra.*

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amount of the assets so directed to be employed (*h*). In the absence of any express direction upon the subject, the personal representative will not be justified in employing in the business a larger amount of the assets than was employed therein at the testator's death (*i*).

Torts committed by representative.

The personal representative will become liable in respect of torts committed by him, no less than upon contracts entered into by him, in the course of his management of the deceased's estate. But, as in the case of personal liability upon contract, so in the case of personal liability in tort, the representative will be entitled to claim indemnity out of the assets in any case in which the tort in respect of which liability has been incurred, has been committed in the proper and ordinary course of management of the estate (*k*). And, to complete the analogy between cases of contract and tort, the person claiming damages in respect of a tort so committed, is entitled to stand in the place of the representative against the estate (*l*).

Money advanced to representative for purposes of administration.

The personal liability of the representative also extends to any money advanced to him in his representative capacity even though the money be received by him in consequence of some act done or contract entered into by the deceased (*m*). But, where money is paid for the use of the representative in consequence of a contract made with the deceased, he will be liable only in his representative capacity, and a subsequent

(*h*) *Dowse* v. *Gorton*, [1891] A. C. 190, at p. 208.

(*i*) *Kirkman* v. *Booth*, 11 Beav. 273; *M'Neillie* v. *Acton*, 4 De G. M. & G. 744; *Land* v. *Land*, 43 L. J. Ch. 311.

(*k*) *Benett* v. *Wyndham*, 4 De G. F. & J. 259; *Re Raybould, Raybould* v. *Turner*, [1900] 1 Ch. 199.

(*l*) *Re Raybould, Raybould* v. *Turner*, *supra*.

(*m*) *Ashby* v. *Ashby*, 7 B. & C. 444; *Farhall* v. *Farhall*, L. R. 7 Ch. App. 123.

promise to pay, founded on the previous contract, will make no difference in this respect (*n*).

Expenses of funeral.

An executor or a person who afterwards takes out administration, giving orders, or adopting orders given by another person, for the funeral of the deceased, becomes personally liable to the undertaker for the expenses (*o*); and it would seem that an executor who does not give or adopt any such orders, will be personally liable, under an implied contract, to the person who furnishes the funeral in manner suitable to the condition and circumstances of the deceased (*p*); even though he never receives assets to the amount of the funeral expenses (*q*).

(*n*) *Dowse* v. *Coxe*, 3 Bing. 20; *Powell* v. *Graham*, 7 Taunt. 581; *Farhall* v. *Farhall*, *supra*.

(*o*) *Brice* v. *Wilson*, 8 A. & E. 349 n; *Lucy* v. *Walrond*, 3 Bing. N. C. 841.

(*p*). *Rogers* v. *Price*, 3 Y. & J. 28; *Corner* v. *Shew*, 3 M. & W. 350, 356.

(*q*) *Sharp* v. *Lush*, 10 Ch. D. 468.

CHAPTER XIX.

OF THE LIABILITY OF THE REPRESENTAVIVE FOR DEFAULT.

SECTION I.

Of Devastavit.

Liability correlative to duty.

A PERSONAL representative is bound to administer the estate of his deceased testator or intestate with due diligence and in a proper manner in the interest of those on whose behalf he is acting, namely, the creditors and beneficiaries; and he will be liable to one or other, or both of these if he neglect or fail to perform the various duties, the burden of which, as representative, he has undertaken, or if he take advantage of his office to make a profit for himself out of the estate committed to him.

Nature of common law liability to creditors.

The right of creditors to payment of their debts out of *legal* assets is a legal right enforceable against the representative at common law, and if, in the course of the administration, the representative act without regard to the legal rights of creditors, he will commit a *devastavit*, and may be made answerable by process of law *de bonis propriis* at the instance of any creditor, whose legal right is thereby prejudiced.

Definition of "*devastavit.*"

According to The Touchstone (*a*) "a *devastavit* or waste in an executor or administrator is when he doth misemploy the estate of the deceased, and misdemean

(*a*) Page 486.

himself in the managing thereof against the trust reposed in him."

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Execution *de bonis propriis* founded upon execution *de bonis testatoris.*

The expression "*devastavit*" is derived from the return made by the sheriff to the writ of execution which a creditor might issue upon judgment *de bonis testatoris* recovered by him against the representative. Before the Judicature Acts, if the sheriff returned to the writ *nulla bona testatoris* and also *devastavit* (which he might do) the plaintiff might immediately sue out a *fi. fa. de bonis propriis* against the defendant (*b*); and although since the Judicature Acts, the practice of instituting proceedings at law upon judgment obtained against the representative is virtually superseded by the modern practice of bringing an administration action, it does not appear that the former practice has been altogether abolished (*c*).

Action suggesting *devastavit.*

If the sheriff returns *nulla bona testatoris* only, the plaintiff may proceed by action on the judgment, suggesting a *devastavit*, and if he succeeds in such action, he will be entitled to judgment and execution against the defendant personally as in ordinary cases (*d*).

Transfer of action.

Proceedings in an action suggesting a *devastavit* may be transferred to the Chancery Division, but will not be stayed merely because an administration action has been commenced (*e*).

Bar of action.

A claim founded upon a *devastavit* is at law regarded as a simple contract claim and, accordingly, no action for *devastavit* can be maintained after the lapse of six years from the time when the acts alleged to have been

(*b*) Bullen and Leake Prec. Plead. (5th ed.), p. 699. See R. S. C., Ord. 42, rr. 3, 28.

(*c*) *Stewart* v. *Rhodes*, [1900] 1 Ch. 386, 403 [C. A.].

(*d*) Bullen and Leake Prec. Plead. (5th ed.), p. 699.

(*e*) *Re Timms*, 47 L. J. Ch. 831.

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a *devastavit* were committed (*f*). And, further, if a creditor has misled the representative, so as to induce him to part with the assets in a manner which would be a *devastavit*, that creditor cannot complain of the *devastavit* (*g*).

Liability in equity as for *devastavit* to creditors and beneficiaries.

It is, however, seldom necessary for a creditor, seeking to enforce the representative's liability, to frame his action on the principle of *devastavit*. Creditors, in common with beneficiaries, have the right to resort to the equitable jurisdiction of the Court to have the trusts of administration properly executed. The personal representative is regarded in equity as a trustee for the special purposes of administration (*h*); and, accordingly, is made accountable, in equity, to creditors and beneficiaries alike, for the misapplication of any part of the deceased's estate, whether real (*i*) or personal, vested in him for the purpose of administration; and liable, as for a *devastavit*, for all breaches of any of the trusts which are incident to the office which he has undertaken (*k*).

SECTION II.

OF DEFAULT IN THE COLLECTION AND MANAGEMENT OF THE ESTATE.

Neglect to enforce payment of debts.

The personal representative must exercise due diligence in getting in and collecting the estate and effects of the deceased; and, subject to his statutory right to accept composition or security for debts owing to the

(*f*) 21 Jac. 1, c. 16; *Charlton* v. *Low*, 3 P. Wms. 328; *Thorne* v. *Kerr*, 2 Kay & J. 54; *Re Gale, Blake* v. *Gale*, 22 Ch. D. 820; *Re Hyatt, Bowles* v. *Hyatt*, 38 Ch. D. 609, 616. As to the rule in equity, see *post*, p. 462.

(*g*) *Re Birch, Roe* v. *Birch*, 27 Ch. D. 622.

(*h*) *Ante*, pp. 85, 87.

(*i*) 60 & 61 Vict. c. 65.

(*k*) *Re Marsden, Bowden* v. *Layland*, 26 Ch. D. 783. As to the method of charging the representative upon his account, see *post*, p. 461, 462.

estate, will be liable for any loss occasioned by his neglect to enforce payment thereof (*l*). So, if an executor or administrator, by his delay in enforcing payment of a debt owing to the deceased, enabled the debtor to plead the Statute of Limitations, he will be liable to account for the loss occasioned thereby (*m*).

By s. 21 (2) of the Trustee Act, 1893 (*n*), it is now provided that:

Power for executors to compound.

> "An executor or administrator . . . may, if and as he . . . may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate . . . and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him . . . seem expedient, without being responsible for any loss occasioned by any act or thing so done by him . . . in good faith."

In *Re Houghton, Hawley* v. *Blake* (*o*), the question arose whether one of two executors can make a compromise with the other executor, and KEKEWICH, J., having observed that the transaction of compromise had been honestly made, continued "Executors are seised of their office *per mie et per tout;* each of them represents the estate for all purposes. I think I should be infringing on that rule if I were to say that one executor could not compromise the claim of his co-executor. The position, however, is a delicate one, and an executor in that position would do well to apply to the Court for

(*l*) *Tebbs* v. *Carpenter*, 1 Madd. 290; *Clack* v. *Holland*, 19 Beav. 262, 271; *De Cordova* v. *De Cordova*, 4 App. Cas. 692. See *Re Brogden, Billing* v. *Brogden*, 38 Ch. D. 546 [C. A.]. See *Re Roberts, Knight* v. *Roberts*, 76 L. T. 479.

(*m*) *Hayward* v. *Kinsey*, 12 Mod. 568, 573.

(*n*) 56 & 57 Vict. c. 53.

(*o*) [1904] 1 Ch. 622.

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direction as to whether he is at liberty to make the compromise."

Investment of cash in hand.

Although the personal representative is not justified in unnecessarily allowing cash belonging to the estate to remain uninvested in his hands, or at the bank (*p*), there is no general rule requiring him forthwith to invest all moneys from time to time got in by him (*q*). It may well be, especially during the first year after the death of a testator or intestate, and until the state of his affairs has been fully ascertained, that it is necessary for an executor or administrator to keep a considerable sum of money at call for purposes of administration (*r*).

Liability for non-investment.

Where, however, a personal representative can be shown to have retained money uninvested in his hands without any reason or necessity for so doing, he may be charged with the payment of interest thereon (*s*). The rate of interest chargeable against him, in such cases, has usually been 4 per cent. per annum, such being the rate which it was formerly considered he might have obtained by the exercise of due diligence on authorised investments (*t*); but the practice at the present day is to charge interest in such cases at the lower rate of 3 per cent. per annum (*u*).

Liability for loss of investments.

In order to escape liability as against creditors (*x*) for any loss occasioned to the estate by reason of the

(*p*) *Moyle* v. *Moyle*, 2 Russ. & My. 710.

(*q*) *Johnston* v. *Newton*, 22 L. J. Ch. 1039.

(*r*) *Dawson* v. *Massey*, 1 Ball & B. 219, 231; *Re Hulkes, Powell* v. *Hulkes*, 33 Ch. D. 552, 558.

(*s*) *Kildare* v. *Hopson*, 4 Bro. P. C. 550; *Ashburnham* v. *Thompson*, 13 Ves. 402; *Williams* v. *Williams*, 1 W. R. 237; *Att.-Gen.* v. *Köhler*, 9 H. L. Cas. 654, 680.

(*t*) *Robinson* v. *Robinson*, 1 De G. M. & G. 247; *Att.-Gen.* v. *Alford*, 4 De G. M. & G. 843; *Re Hulkes, Powell* v. *Hulkes, supra.*

(*u*) *Re Barclay, Barclay* v. *Andrew*, [1899] 1 Ch. 674; *Re Whiteford, Inglis* v. *Whiteford*, [1903] 1 Ch. 889, at p. 896. See, however, *Owen* v. *Richmond*, W. N. (1895), p. 29.

(*x*) *Doyle* v. *Blake*, 2 Sch. & Lef. 231, 239; *Dowse* v. *Gorton*, [1891] A. C. 190, 204.

subsequent depreciation of securities in which he invests, the personal representative must take care to invest in one or more of the investments authorised by statute for the investment of trust funds (*y*).

Where, however, the investment is made on behalf of beneficiaries, and no question of liability towards creditors can arise, the representative will be at liberty to have regard to the investment clause, if any, contained in the will; for in such case he is acting rather as trustee of the will of the deceased than in the capacity of representative (*z*).

Extent of liability.

If a personal representative invests in unauthorised securities, which afterwards fall in value, he will be liable personally to make good the loss (*a*); but if any profit accrues from a rise in value of the securities he will not be allowed to have the benefit of the profit, but it will accrue for the benefit of the estate of the deceased (*b*).

Accidental loss.

With regard to loss occasioned to the estate where assets, having come into the possession of the personal representative, are afterwards, by accident, lost to the estate, the rule at law as well as in equity, now is that an executor or administrator is in the position of a gratuitous bailee, and cannot be charged with loss unless wilful default be proved (*c*).

Employment of agents.

As a general rule, a personal representative who, in the ordinary course of business, employs an agent for the purpose of the trust, is not chargeable with loss arising from the latter's default unless due to some

(*y*) 56 & 57 Vict. c. 53, s. 1.

(*z*) See *Re Morrison, Morrison* v. *Morrison*, [1901] 1 Ch. 701.

(*a*) *Clough* v. *Bond*, 3 My. & C. 496.

(*b*) *Phayre* v. *Peree*, 3 Dow. 128; *Pocock* v. *Reddington*, 5 Ves. 795, 800.

(*c*) *Jones* v. *Lewis*, 2 Ves. 240; *Job* v. *Job*, 6 Ch. D. 562. See, as to loss by fire, *Bailey* v. *Gould*, 4 You. & Coll. 221.

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wilful default of his own (*d*). But this rule is subject to the limitation that the agent must not be employed out of the ordinary scope of his business (*e*).

A personal representative is bound to exercise discretion in the choice of agents; but, so long as he selects persons properly qualified, he cannot be made responsible for their want of intelligence or dishonesty (*f*).

Employment of banker or broker.

Thus, an executor or administrator is not liable for the acts or defaults of any banker or broker with whom securities representing the estate are deposited for safe custody or investment (*g*), and is justified in temporarily placing money on deposit at interest with a banker of good credit pending investment, or in entrusting a respectable broker to make investments (*h*); but in neither case is he justified in allowing money to remain in the hands of the banker or broker for a longer period than is necessary (*i*).

Retaining unauthorised investments.

If the estate of the deceased comprises investments which are of a risky character, and such as are not authorised by law for the investment of trust funds, his personal representatives should convert them with all convenient speed (*k*), and, if necessary, invest the proceeds in authorised securities or stocks. So, executors have been held personally liable for allowing money to remain upon personal security (*l*), as where

(*d*) *Clough* v. *Bond*, 3 My. & C. 490, 496; *Re Brier*, *Brier* v. *Evison*, 26 Ch. D. 238 [C. A.]; *Re Blundell*, *Blundell* v. *Blundell*, 40 Ch. D. 370.

(*e*) *Fry* v. *Tapson*, 28 Ch. D. 268.

(*f*) *Re Weall*, 42 Ch. D. 674. See *Jobson* v. *Palmer*, [1893] 1 Ch. 71.

(*g*) 56 & 57 Vict. c. 53, s. 24.

(*h*) *Ex parte Belchier*, Amb. 219; *Speight* v. *Gaunt*, 9 App. Cas. 1; *Re Blundell*, *Blundell* v. *Blundell*, *supra*; *Shepherd* v. *Harris*, [1905] 2 Ch. 310.

(*i*) *Moyle* v. *Moyle*, 2 Russ. & M. 710; *Darke* v. *Martyn*, 1 Beav. 525. See *Wyman* v. *Paterson*, [1900] A. C. 271.

(*k*) *Buxton* v. *Buxton*, 1 My. & C. 80, 93; *Grayburn* v. *Clarkson*, L. R. 3 Ch. App. 605.

(*l*) *Lowson* v. *Copeland*, 2 Bro. C. C. 156; *Powell* v. *Evans*, 5 Ves. 839.

losses were occasioned by the non-sale of Crystal Palace shares, which were at a premium at the testator's death, but which afterwards fell below par (*m*). But the Court will allow the personal representative a reasonable discretion in this respect, having regard to the particular circumstances of the case. Thus, where the deceased leaves investments of a hazardous and speculative character, his personal representative will not be held personally liable for loss to the estate, if in the exercise of an honest discretion, and acting with due diligence in watching the market and otherwise, he sells during the twelve months, or even afterwards, at a lower price than might have been obtained at some particular time within the twelve months (*n*).

As against beneficiaries, the personal representative is entitled to rely upon the provisions, if any, of the will, directing or enabling him, at his discretion, to postpone conversion. Thus, where a testator gave to his executors an absolute discretion to postpone the sale and conversion of his estate, and, in exercise of their discretion, the executors allowed certain shares in an unlimited company to remain unconverted for more than a year from the testator's death, it was held that in the absence of *mala fides*, they were not liable for loss arising to the estate from the non-conversion (*o*).

Continuance of deceased's business.

Where the estate of the deceased devolving upon his death, includes a business carried on by him up to the time of his death, the representative will no doubt incur considerable responsibilities. Thus, he cannot

(*m*) *Hughes* v. *Empson*, 22 Beav. 181.

(*n*) *Buxton* v. *Buxton*, 1 My. & C. 80, 93; *Marsden* v. *Kent*, 5 Ch. D. 598 [C. A.]. See *Re Chapman, Cocks* v. *Chapman*, [1896] 2 Ch. 763 [C. A.].

(*o*) *Re Norrington, Brindley* v. *Partridge*, 13 Ch. D. 654 [C. A.]; *Gray* v. *Siggers*, 15 Ch. D. 74. See *Re Laing's Settlement*, [1899] 1 Ch. 593.

avoid becoming personally liable to third persons upon such trade contracts as he may find it necessary to make, although he will be entitled to be indemnified by creditors or beneficiaries in whose interests the business has been properly continued (*p*). The representative will not, however, render himself liable for default unless he improperly continue the business (*q*).

The extent of the representative's liability to be charged, at the hands of creditors of the deceased, with default in respect of the continuance by him of the deceased's business, is explained by Lord MACNAGHTEN in *Dowse* v. *Gorton* (*r*), as follows: "Creditors of a deceased trader whose business has been continued by his executors, when they come for an administration decree, must treat the continuance of the business either as proper or as improper. If the business has been properly continued as between the executors and the creditors, or if the creditors choose to treat it so, which comes to the same thing, the executors are entitled to be indemnified against all liabilities properly incurred in carrying it on. If it has been improperly continued and the creditors choose to treat the continuance as improper (which, of course, they are not bound to do), they may proceed in the proper way to make the executors accountable for the value of the assets used in carrying on the business, and they may also follow the assets and obtain a charge on the business in the hands of the executors for the value of the assets misapplied, with interest thereon; and they may enforce the charge, if necessary, by means of a receiver and a sale. Then there can be no room for any claim to indemnity on the part of the

(*p*) See *ante*, p. 436.

(*q*) See, as to the power of the representative to carry on the deceased's business as against creditors and beneficiaries respectively, *ante*, p. 160.

(*r*) [1891] A. C. 190, 203.

executors. The charge in favour of the trust estate must be satisfied first. The executors can only take what is left. But the creditors must do one thing or the other. Though they are not bound by what they do in ignorance, and may, by leave of the Court, sue in respect of wilful default after having taken the usual order, they cannot approbate and reprobate in one breath. They cannot claim the assets of the business as a going concern in the state and condition in which those assets happen to be at the moment when they choose to intervene, and at the same time refuse the executors indemnity in respect of liabilities incurred in carrying on the business."

The above observations would appear to apply *mutatis mutandis* as between the representative and beneficiaries, where the former has continued the business of the deceased in the absence of authority so to do contained in the will.

Management of real estate.

It has already been suggested (*s*) that in some cases falling within the Land Transfer Act, 1897, it may become necessary for the personal representative to take upon himself the temporary management of real estate. In such a case it would seem that the personal representative will be liable, if by reason of want of caution or diligence in his dealings, he cause the estate to be wasted (*t*); as, for instance, if he grossly misconduct the cultivation of the land, or refuse or remove a solvent and respectable tenant (*u*), but that he will not be liable for mere permissive waste, as neglecting to keep buildings in proper repair (*x*).

(*s*) *Ante*, p. 161.

(*t*) See *Rowley* v. *Adams*, 2 H. L. Cas. 725; *Buxton* v. *Buxton*, 1 My. & C. 80.

(*u*) *Wragg* v. *Denham*, 2 You. & Coll. 117; *Anon.* 1 Vern. 45; *Hughes* v. *Williams*, 12 Ves. 493 (cases of mortgagee in possession).

(*x*) *Powys* v. *Blagrave*, 4 De G. M. & G. 448.

SECTION III.

OF DEFAULT IN PAYMENT OF DEBTS.

Expenditure upon funeral.

An instance of *devastavit* given in The Touchstone (*y*), is where "the executor or administrator doth bestow more upon the funeral of the deceased than is meet, having respect to his degree and estate." As against beneficiaries, if the estate be solvent, the representative will be justified in making such expenditure as the estate and degree of the deceased demand (*z*). But, as against creditors, in the case of an insolvent estate, the rule is somewhat more strict than the above statement would seem to imply, for in such case, no payments will be allowed the representative beyond what are necessary (*a*), as for coffin, shroud, and ringing the bell, and the fees of the parson, clerk, sexton, and bearers, but not for pall or ornaments (*b*).

Payment of debts in wrong order.

Where a personal representative has paid debts in a wrong order of administration (*c*), he will become personally liable at the suit of any creditor prejudiced thereby (*d*), of whose claim he had notice at the time of payment (*e*). But payment of debts even in the wrong order is not a wrong entitling a legatee to relief (*f*).

Even against beneficiaries, however, a personal representative may be charged with loss arising from negligence in not paying off immediately an interest-

(*y*) Shep. Touch. (ed. Preston), p. 486.

(*z*) *Offley* v. *Offley*, Pr. Ch. 27; *Stag* v. *Punter*, 3 Atk. 119.

(*a*) *Edwards* v. *Edwards*, 4 Tyrw. 438; *Stag* v. *Punter*, *supra*; *Bissett* v. *Antrobus*, 4 Sim. 512; *Reeves* v. *Ward*, 2 Bing N. C. 235.

(*b*) *Shelley's Case*, 1 Salk. 296.

(*c*) See *ante*, pp. 192 *et seq.*

(*d*) Shep. Touch. (ed. Preston), p. 486.

(*e*) Toller (7th ed.), p. 291. See *Re Fludyer*, *Wingfield* v. *Erskine*, [1898] 2 Ch. 562.

(*f*) *Turner* v. *Turner*, 1 Jac. & W. 30; *Re Stevens*, *Cooke* v. *Stevens*, [1898] 1 Ch. 162 [C. A.].

bearing debt (*g*), provided there are assets sufficient for its payment, and which (without interference with his right to prefer one debt to another of equal degree) the personal representative is bound to apply in payment thereof (*h*).

Payment of legacies before debts.

A personal representative who makes distribution of the assets among beneficiaries without having first paid or provided for the debts or liabilities of the deceased, commits a *devastavit* or waste, and will be chargeable unless he has availed himself of the protection afforded by Lord St. Leonard's Act (*i*), for so much as he has wasted *de bonis propriis* (*k*).

Thus, where prior to the statute above mentioned an executor acting *bonâ fide* and under a conviction that the assets were amply sufficient for payment of the testator's debts, permitted specific legatees to retain or possess themselves of the property bequeathed to them, he was held answerable for the value of that property, with interest at 4 per cent. (*l*), if there should ultimately be a deficiency in the assets, although the deficiency were occasioned by subsequent events which the executor or administrator had no reason to anticipate; and the Court directed an account of the value of the property so possessed by the legatees, and interest to be computed unless it were certain that the assets would be ultimately sufficient to satisfy the creditors (*m*).

Extent of liability.

The liability of an executor paying a legacy or share of residue extends to cases where he has notice of a contingent or possible liability which may ripen into a

(*g*) *Seaman* v. *Dee*, 2 Lev. 40; *Hall* v. *Hallet*, 1 Cox, 134.

(*h*) *Turner* v. *Turner*, 1 Jac. & W. 30; *Robinson* v. *Cumming*, 2 Atk. 409; *Re Stevens, Cooke* v. *Stevens*, [1898] 1 Ch. 162, at p. 173 [C. A.].

(*i*) *Infra*.

(*k*) Shep. Touch. (ed. Preston), p. 486.

(*l*) As to the present rate of interest, see *ante*, p. 444.

(*m*) *Spode* v. *Smith*, 3 Russ. 511. See *Davies* v. *Nicholson*, 2 De G. & J. 693.

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certain claim (*n*). In such cases, unless the contingent liability falls within the class of contingent liabilities excepted by statute from the general rule (*n*), the proper course is for the executor to apply to the Court for leave to proceed to a distribution (*o*).

Statutory notice to creditors protects personal representatives.

Executors are to a large extent relieved from the risk, which they formerly incurred upon proceeding to a distribution among beneficiaries under the mistaken impression that all debts due from the estate were duly paid or provided for, by Lord St. Leonard's Act (*p*), which by s. 29 in effect provides that after giving such notices as would be given by an order of the Court in an administration action to creditors and others to send in their claims, an executor shall not be liable in respect of any claim of which he had not then notice, but may proceed to a distribution of the assets without prejudice to the right of creditors to follow the assets after distribution.

An executor who has distrbuted the assets of his testator, after issuing advertisements and taking the steps pointed out by the above-mentioned statute, will have the same protection as if he had administered the estate under a decree of the Court (*q*). In determining whether executors have given such notices as are sufficient to entitle them to the protection of the statute, the Court will have regard to the circumstances of the particular case, such as the place of residence of the testator and his position in life. No general rule can be laid down as to the time which should be allowed for bringing in claims or as to the agency through which the notices should be issued (*r*).

(*n*) 22 & 23 Vict. c. 35, ss. 27, 28. *Ante*, p. 228.

(*o*) See *ante*, p. 227.

(*p*) 22 & 23 Vict. c. 35.

(*q*) *Clegg* v. *Rowland*, L. R. 3 Eq. 368; *Newton* v. *Sherry*, 1 C. P. D. 246; *Hunter* v. *Young*, 4 Ex. D. 256 [C. A.].

(*r*) *Re Bracken, Doughty* v. *Townson*, 43 Ch. D. 1 [C. A.]. See *Stuart* v. *Babington*, 27 L. R. Ir. 551.

Right to recover assets distributed.

A personal representative has also the right to recover back from beneficiaries assets distributed among them, without notice of any debts (*s*).

Assent to devise of land.

The provisions of the Land Transfer Act, 1897 (*t*), enabling a personal representative to assent to any devise contained in the will or to convey any land devolving upon him under the Act to any person entitled thereto as heir, devisee or otherwise, at *any* time after the death of the owner, and the exemption of the personal representative from liability in respect of such land who assents or conveys subject to a charge for the payment of any money which he is liable to pay have already been considered in a former chapter (*u*).

Payment of unfounded claims.

A personal representative will render himself liable for loss occasioned by the payment of claims which are without foundation in law or in equity (*x*). Thus, where executors paid to a physician, who had attended the deceased in his last illness, a sum of £100 as a gratuity in recognition of his care and attention, it was held that, as the physician could not have legally claimed the money, the executors must make it good to the estate (*y*). So, also, a representative may be obliged to refund money paid in discharge of a bond founded on immoral consideration (*z*), or expended in support of the deceased's household establishment for a longer time than is reasonably necessary for breaking it up and discharging the servants (*a*).

(*s*) *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18; *Whittaker* v. *Kershaw*, 45 Ch. D. 320 [C. A.].

(*t*) 60 & 61 Vict. c. 65, s. 3 (1).

(*u*) *Ante*, pp. 408, 411. See also *ante*, p. 161.

(*x*) *Re Rownson*, *Field* v. *White*, 29 Ch. D. 358, 363 [C. A.]; *Midgley* v. *Midgley*, [1893] 3 Ch. 282 [C. A.].

(*y*) *Shallcross* v. *Wright*, 12 Beav. 558.

(*z*) *Robinson* v. *Gee*, 1 Ves. 251.

(*a*) *Field* v. *Peckett* (No. 3), 29 Beav. 576. See *Webb* v. *Shaftesbury*, 7 Ves. 480.

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Payment of statute-barred debts.

An exception to this rule, which it is difficult to support on any very convincing grounds, is now established, namely, that inasmuch as the Statute of Limitations does not bar the debt itself, but only the creditor's remedy after the statutory period has elapsed, a personal representative may pay a debt which is justly due from the deceased, though barred by the statute (*b*); and accordingly, that the personal representative is not bound to plead the Statute in an action brought against him by the creditor for the barred debt. But a personal representative is not justified in paying a debt which has been judicially decided not to be recoverable out of the estate which it his duty to protect (*c*), nor in paying a statute barred debt after a decree for administration has been made (*d*).

Payment of debt irrecoverable under Statute of Frauds.

It was attempted in a recent case to extend this exception, so as to justify an executor in paying a debt of the testator, which was not evidenced in writing as required by the Statute of Frauds. But though there would seem to be no difference in principle between such a debt and one barred by the Statute of Limitations, it was held that the exception was not to be extended, and that the payment by an executor or an administrator of a debt which is not enforceable by reason of this Statute is a *devastavit*, and that the amount so paid must be made good by him out of his own moneys (*e*).

Trustee Act, 1893.

By s. 21 (1) of the Trustee Act, 1893 (*f*), it is enacted that:

> "An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient."

(*b*) *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415; *Hill* v. *Walker*, 4 Kay & J. 166; *Re Rownson, Field* v. *White*, 29 Ch. D. 358, 363 [C. A.]; *Midgley* v. *Midgley*, [1893] 3 Ch. 282 [C. A.].

(*c*) *Midgley* v. *Midgley*, *supra*.

(*d*) *Shewen* v. *Vanderhorst*, 1 Russ. & M. 347; *Re Wenham, Hunt* v. *Wenham*, [1892] 3 Ch. 59.

(*e*) *Re Rownson*, *supra*.

(*f*) 56 & 57 Vict. c. 53.

This section is apparently merely declaratory of the former law, and does not, of course, enable a personal representative to pay unfounded claims. Under the former law a representative was not held answerable for payments made in settlement of claims to the advantage of the estate (*g*).

SECTION IV.

OF DEFAULT OF CO-EXECUTOR OR CO-ADMINISTRATOR.

It remains to be considered in what cases one of several personal representatives is liable for loss occasioned to the estate by the others. Inasmuch as the Court leans strongly against joint administration (*h*), the question practically resolves itself into one of liability as between co-executors.

By s. 24 of the Trustee Act, 1893 (*i*), it is enacted that:

Implied indemnity of trustees.

> "A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, . . . nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers."

Meaning of "trustee."

The expression "trustee" includes an executor or administrator (*k*).

Extent of liability.

The above section limits the liability of an executor for loss occasioned to the estate by the acts or defaults

(*g*) *Blue* v. *Marshall*, 3 P. W^ms^. 381.
(*h*) *Ante*, p. 42.
(*i*) 56 & 57 Vict. c. 53.
(*k*) Section 1.

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of his co-executor, to cases in which the loss is attributable to his own wilful default in improperly allowing his co-executor to obtain sole control over the assets.

Sole control of one executor "improper" when "unnecessary."

An executor acts improperly in allowing his co-executor to have sole control of the assets whenever there is no necessity for his doing so. Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative (*l*).

As a general rule, therefore, if one executor does any act which enables his co-executor unnecessarily to obtain sole possession of money belonging to the testator's estate, which, but for that act, he could not have obtained possession of, and the money is afterwards misapplied, the executor who thus enables his co-executor to obtain possession of the money, is liable to make good the loss (*m*).

Unnecessary payments to co-executor.

So, if an executor, having received the whole or part of his testator's estate, voluntarily and unnecessarily pays it over to his co-executor, who loses or embezzles it, the former will be liable for the loss (*n*).

Collection of assets by co-executor.

An executor will not be responsible for the misapplication by his co-executor, of assets got in by the latter in the ordinary course of administration (*o*), provided he does not allow them to remain for longer than is necessary in his sole control (*p*). But an agreement between several executors that each shall "receive and intermeddle" with distinct portions of the assets is inconsistent with the duty of each to administer the

(*l*) *Re Gasquoine, Gasquoine* v. *Gasquoine*, [1894] 1 Ch. 470 [C. A.].

(*m*) *Langford* v. *Gascoyne*, 11 Ves. 333; *Lord Shipbrook* v. *Lord Hinchinbrook*, 11 Ves. 252; *Underwood* v. *Stevens*, 1 Mer. 712; *Candler* v. *Tillett*, 22 Beav. 257; *Re Gasquoine, supra; Re Bennison, Cutler* v. *Boyd*, 60 L. T. 859; *Lowe* v. *Shields*, [1902] 1 I. R. 320 [C. A.].

(*n*) *Townsend* v. *Barber*, 1 Dick. 356; *Macpherson* v. *Macpherson*, 1 Macq. H. L. Cas. 243.

(*o*) *Langford* v. *Gascoyne, supra; Candler* v. *Tillett, supra.*

(*p*) *Styles* v. *Guy*, 1 Macn. & G. 422; *Candler* v. *Tillett, supra.*

whole estate, and each will be liable for the misapplication by the other of assets received by him pursuant to such an agreement (*q*).

Payment to co-executor for purposes of administration.

Again, an executor will not be considered as having "unnecessarily" allowed assets to remain in the sole control of his co-executor if he has done so for the purpose of enabling the latter, as agent, to perform some act of administration for which he is specially qualified (*r*). Thus, an executor has been held not to be liable for the misapplication of money entrusted to his co-executor, who was a stockbroker, for the purpose of investment (*s*).

So an executor may properly remit money to his co-executor to be applied by him in payment of debts in a distant place (*t*). But if he remit money upon the representation of his co-executor that there are debts to be paid, without first ascertaining the truth of the representation, and it turns out that there are no such debts, he will be personally liable (*u*).

Executor cannot plead his own negligence.

It is no defence to an executor who has improperly allowed his co-executor to retain sole control of the trust funds, that his conduct in so doing was free from any improper motive, or that what in the event happened appeared unlikely to occur (*x*). And though an executor may have properly allowed his co-executor to assume sole control of any part of the assets, he will still be responsible if he allows a breach of trust to be committed which with due diligence he could have

(*q*) *Gill* v. *Att.-Gen.*, Hard. 314.

(*r*) *Churchill* v. *Hobson*, 1 P. Wms. 241; *Bacon* v. *Bacon*, 5 Ves. 331; *Chambers* v. *Minchin*, 7 Ves. 186.

(*s*) *Re Gasquoine, Gasquoine* v. *Gasquoine*, [1894] 1 Ch. 470 [C. A.]. See *Shepherd* v. *Harris*, [1905] 2 Ch. 310, and *cf. Lowe* v. *Shields*, [1902] 1 I. R. 320 [C. A.].

(*t*) *Joy* v. *Campbell*, 1 Sch. & Lef. 341; *Moses* v. *Levi*, 3 You. & Coll. 359.

(*u*) *Lord Shipbrook* v. *Lord Hinchinbrook*, 11 Ves. 252.

(*x*) *Clough* v. *Bond*, 3 My. & C. 490; *Langford* v. *Gascoyne*, 11 Ves. 333.

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prevented, for it is the duty of an executor to watch over, and, if necessary, to correct the conduct of his co-executors (*y*).

Renunciation of probate.

A person named executor who has acted in the administration and so accepted the office of executor, cannot avoid responsibility by subsequently renouncing probate (*z*).

SECTION V.

OF THE JUDICIAL TRUSTEES ACT, 1896.

Protection to representative acting "honestly and reasonably."

Personal representatives who act in good faith and to the best of their judgment in the administration of the estate will be entitled to claim the protection afforded by s. 3 (1) of the Judicial Trustees Act (*a*), which enacts as follows:

Jurisdiction of Court in cases of breach of trust.

> "If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same."

Act applies to *devastavit* committed by representative.

By s. 1 (2) it is provided that "the administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Act," and it has accordingly been held that s. 3 applies to the case of an executor who has been guilty of *devastavit* (*b*).

(*y*) *Styles* v. *Guy*, 1 Mac. & G. 422. See *Re Second East Dulwich, etc. Building Society*, 68 L. J. Ch. 196.

(*z*) *Read* v. *Truelove*, Amb. 417; *Doyle* v. *Blake*, 2 Sch. & Lef. 231, 245. And see *ante*, p. 23.

(*a*) 59 & 60 Vict. c. 35.

(*b*) *Re Kay, Mosley* v. *Kay*, [1897] 2 Ch. 518; *Re Roberts, Knight* v. *Roberts*, 76 L. T. 479; *Re Lord De Clifford's Estate, Lord De Clifford* v. *Quilter*, [1900] 2 Ch. 707.

Where a testator's estate consisted of assets amounting to £22,000 and the debts as ascertained at his death amounted only to £100, his executor was held under all the circumstances of the case to have acted "reasonably" in paying a legacy to the widow of £300, notwithstanding that as a result of the usual advertisement for creditors, a claim against the estate was ultimately substantiated for a sum of £26,000 (*c*). In the case referred to, the following observations were made by ROMER, J.: "In construing s. 3 of this last mentioned Act, I think the Court is bound to remember the provisions of 22 & 23 Vict. c. 35, s. 29, and in my opinion a prudent and reasonable executor ought to advertise for creditors as soon as possible after his testator's death, and when he has notice of any claim, *primâ facie*, he ought not to proceed to pay the legatees without making due provision for all claims of which he has had notice," but his lordship refused to deprive the executor of the benefit of the section merely because there was some delay in issuing the advertisements for creditors.

No general principle governing application of the Act.

No general rules or principles can be laid down to be acted on in carrying out the provisions of this section, and each case must depend on its own circumstances; but the Court must be satisfied, before exercising the powers conferred on it, by sufficient evidence, that the representative acted reasonably (*d*), and that under all the circumstances he ought fairly to be excused from his breach of trust (*e*).

(*c*) *Re Kay, Mosley* v. *Kay*, [1897] 2 Ch. 518.

(*d*) *Re Turner*, [1897] 1 Ch. 536. See *Re Second East Dulwich, etc. Building Society*, 68 L. J. Ch. 196; *Chapman* v. *Browne*, [1902] 1 Ch. 785 [C. A.]; *Re Houghton, Hawley* v. *Blake*, [1904] 1 Ch. 622, 626.

(*e*) *National Trustees Co. of Australasia* v. *General Finance Co.*, [1905] A. C. 373.

CHAPTER XX.

OF THE LIABILITY OF THE REPRESENTATIVE TO ACCOUNT.

Duty of representatives to keep and render accounts.

It is well settled that it is the bounden duty of executors or administrators to keep clear and accurate accounts of their administration of the property, and to be always ready to render such accounts when called upon to do so (*a*). If an action is rendered necessary by reason of their refusal to render proper accounts, they may be liable in costs, even though they allege that nothing is due from them, which turns out to be the fact (*b*). It will be no excuse for failure to keep and produce proper accounts that the personal representatives are charged with breach of trust (*c*), nor that they are inexperienced in keeping accounts, and therefore unable to do so, for in such a case it would be their right and duty to employ a competent accountant at the expense of the estate (*d*). They cannot attach to their compliance with a request to furnish accounts any condition, such as that they shall be allowed expenses not legally chargeable (*e*); but an executor, even though a solicitor, has been held to be entitled to be guaranteed

(*a*) *Freeman* v. *Fairlie*, 3 Mer. 29, at pp. 43, 44; *Pearse* v. *Green*, 1 Jac. & W. 135, 140; *Thompson* v. *Dunn*, L. R. 5 Ch. App. 573.

(*b*) *Newton* v. *Askew*, 11 Beav. 145, 152; *Eglin* v. *Sanderson*, 3 Giff. 434; *Re Skinner*, *Cooper* v. *Skinner*, [1904] 1 Ch. 289. See *Re Linsley*, *Cattley* v. *West*, [1904] 2 Ch. 785.

(*c*) *Hemry* v. *Macdonald*, 15 W. R. 165.

(*d*) *Wroe* v. *Seed*, 4 Giff. 425, 429. See *New* v. *Jones*, 1 Mac. & G. 668 n.; *Henderson* v. *M'Iver*, 3 Madd. 275.

(*e*) *Underwood* v. *Trower*, W. N. (1867) 83.

against the costs of taking the accounts before rendering them (*f*).

Accounts of mixed assets.

If a representative mixes the assets with his own and employs them in his trade or business, he cannot refuse to produce his trade books in which any part of the accounts of the assets are contained, and if he is in partnership and his co-partners are parties or privy to the irregularity, they may be compelled to produce the books of the firm (*g*).

Direction in will does not exempt representative from liability.

A testator cannot, of course, by any direction in his will, bar a creditor's right to call the executor to account; and even where a testator expressly directed that his executor should not render an account of the residue, the Court nevertheless directed an account against him (*h*).

Power of Court to order representative to account.

Where no accounts or insufficient accounts have been rendered, and application for an order for administration is made by a creditor or beneficiary, the Court may order the application to stand over for a certain time and direct the personal representative to render proper accounts out of Court (*i*).

Ordinary accounts and inquiries in administration action.

If, however, the ordinary decree for administration be made, accounts and inquiries will be directed to be taken by the master. Unless the defendant be charged in the action with loss attributable to some breach of duty (other than a mere wrongful payment) amounting to what is technically known as wilful default, and such breach of duty be proved, the accounts will be taken upon the ordinary footing, that is to say, the personal representative will stand charged merely with his receipts. Any unlawful payments with which he

(*f*) *Re Bosworth, Martin* v. *Lamb*, 58 L. J. Ch. 432.
(*g*) *Freeman* v. *Fairlie*, 3 Mer. 29, at p. 43.
(*h*) *Gibbons* v. *Dawley*, 2 Ch. Ca. 198.
(*i*) Ord. 55, r. 10A.

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seeks to discharge himself will then be disallowed to him (*k*).

Accounts on footing of wilful default.

But where a loss arising out of such a breach of duty as above mentioned is charged and proved in the action the accounts will be directed to be taken upon the footing of wilful default, and the personal representative will stand charged with what he has received, or might have received, but for his wilful default or neglect (*l*).

Whether representative may set up Statute of Limitations.

Where an ordinary decree for administration has been made, it is no exception to the general rule that a personal representative cannot discharge himself by payments made in breach of trust, that such unlawful payments have been made by him upwards of six years before the suit (*m*); although, as has been seen, an action at law cannot be brought against him upon a *devastavit* after the lapse of six years (*n*).

Where, however, a personal representative is sued not as personal representative but as express trustee of a fund, he is entitled in an administration action to claim the protection afforded by s. 8 of the Trustee Act, 1888 (*o*), in respect of any breaches of trust other than such as are fraudulent, committed by him in the course of the administration upwards of six years before the issue of the writ in the action (*p*).

Account on footing of wilful

An account on the footing of wilful default will not be directed in an order made upon originating

(*k*) *Jones* v. *Lewis*, 2 Ves. 240, 241; *Re Stevens, Cooke* v. *Stevens*, [1898] 1 Ch. 162, 170, 172 [C. A.].

(*l*) *Jones* v. *Lewis*, and *Re Stevens*, *supra*. And see cases cited *infra*.

(*m*) *Re Marsden, Bowden* v. *Layland*, 26 Ch. D. 783; *Re Hyatt, Bowles* v. *Hyatt*, 38 Ch. D. 609.

(*n*) *Ante*, p. 454.

(*o*) 51 & 52 Vict. c. 59.

(*p*) *Re Swain, Swain* v. *Bringeman*, [1891] 3 Ch. 233; *Re Page, Jones* v. *Morgan*, [1893] 1 Ch. 304; *Re Timmis, Nixon* v. *Smith*, [1902] 1 Ch. 176, 184; *Re Sharp, Rickett* v. *Rickett*, [1906] 1 Ch. 793. See *How* v. *Earl Winterton*, [1896] 2 Ch. 626 [C. A.]. See as to the recovery of legacies, *ante*, p. 395.

summons (*q*). In order to entitle a plaintiff to an order directing accounts to be taken on the footing of wilful default, wilful default must be alleged in the pleadings (*r*), and at least one act of wilful default must be proved (*s*). If the acts alleged are admitted, the practice is to make only the common decree, adding a submission by the personal representative to account in respect of the acts admitted (*t*). A direction to take the accounts on the footing of wilful default can be made at the hearing or at any subsequent stage of the proceedings (*u*).

default, how obtained.

The receipts with which the personal representative will stand charged will include, of course, any profits upon any part of the assets which have accrued to the estate, for such profits are themselves assets (*x*).

Receipts include profits.

Thus any profits which may arise from continuing the business of the deceased must be accounted for as assets (*y*), and if the personal representative speculate with the assets as if he employ them in his own business, he will be liable, at the option of his *cestuis que trustent*, to bring into account the whole of the profits, or interest at five per cent. per annum, on the amount of the assets so employed (*z*).

Profits of trade, etc.

The personal representative will now be accountable for all rents and profits accruing during the period of

Rents and profits of real estate.

(*q*) See *Re Warren, Weadon* v. *Reading*, W. N. (1884) 112; *Dowse* v. *Gorton*, [1891] A. C. 190, 202.

(*r*) *King* v. *Corke*, 1 Ch. D. 57; *Mayer* v. *Murray*, 8 Ch. D. 424, 426 [C. A.]. See *Barber* v. *Mackrell*, 12 Ch. D. 534.

(*s*) *Sleight* v. *Lawson*, 3 Kay & J. 292; *Re Youngs, Doggett* v. *Ruitt*, 30 Ch. D. 421, 432 [C. A.].

(*t*) *Wildes* v. *Dudlow*, W. N. (1870), p. 231 [C. A.].

(*u*) *Job* v. *Job*, 6 Ch. D. 562; *Re Symons, Luke* v. *Tonkin*, 21 Ch. D. 757. See *Smith* v. *Armitage*, 24 Ch. D. 727.

(*x*) See *ante*, p. 119.

(*y*) *Thompson* v. *Dunn*, L. R. 5 Ch. App. 573.

(*z*) *Docker* v. *Somes*, 2 My. & K. 655; *Wedderburn* v. *Wedderburn*, 4 My. & C. 41; *Jones* v. *Foxall*, 15 Beav. 388; *Flockton* v. *Bunning*, L. R. 8 Ch. App. 323, 327 n.; *Vyse* v. *Foster*, L. R. 8 Ch. App. 309, 320; *Re Davis, Davis* v. *Davis*, [1902] 2 Ch. 314.

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administration, of real estate vesting in him by virtue of the Land Transfer Act, 1897 (*a*). Where, prior to that Act, several executors to whom real estate was devised in trust for sale allowed one of their number to occupy a house on the estate at less than a fair rent, they were held to be chargeable in their accounts with the fair rent (*b*).

Profit made by purchase of assets.

A personal representative will not be allowed to make any profit for himself by purchasing any part of the assets, either directly or through an agent, but will be obliged to account for any advantage which may result to him from the purchase (*c*). So an executor cannot buy in debts owing to the estate at less than their nominal value, but must account for their full amount (*d*). And where the executor of a mortgagee of real estate bought the equity of redemption at a small sum, he was held to be a trustee of the fee for the benefit of the estate (*e*).

Money borrowed by representative from the estate.

If an executor appropriates assets for payment of his own debts, or makes use of the assets for his own enjoyment, though not actually employing them in trade or speculation, he will be regarded as having borrowed the assets without security, and will be charged with interest at five per cent. as a reasonable rate of interest to pay for the accommodation (*f*).

So, where an executor mixed part of the assets with his own moneys at his bankers, and thereby increased

(*a*) 60 & 61 Vict. c. 65.

(*b*) *De Cordova* v. *De Cordova*, 4 App. Cas. 692.

(*c*) *Hall* v. *Hallet*, 1 Cox, 134. See *Re Norrington, Brindley* v. *Partridge*, 13 Ch. D. 654; *Re Harvey, Harvey* v. *Lambert*, 58 L. T. 449; *Clark* v. *Clark*, 9 App. Cas. 733; *Silkstone, etc. Coal Co.* v. *Edey*, [1900] 1 Ch. 167, 171.

(*d*) *Ex parte James*, 8 Ves. 337, 346. See *De Cordova* v. *De Cordova*, *supra*.

(*e*) *Fosbrooke* v. *Balguy*, 1 My. & K. 226.

(*f*) *Piety* v. *Stace*, 4 Ves. 620; *Tebbs* v. *Carpenter*, 1 Madd. 290, 306; *Hooper* v. *Hooper*, W. N. (1874), p. 174 [C. A.]; *Burdick* v. *Garrick*, L. R. 5 Ch. App. 233, 241.

the balance standing to his credit on account current, he was charged with interest at five per cent. on the ground that, by his increased balance, he gained a personal advantage by acquiring additional credit useful to him in his business (*g*).

Principle upon which representative is charged in his accounts with interest.

The general principle upon which the Court proceeds in charging a personal representative with interest upon his accounts, "is to charge him only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it" (*h*).

In respect of mere wrongful payments, the personal representative is dealt with as if he had improperly retained the money in his own hands (*i*), that is to say, he is charged with interest at three (*k*), formerly four, per cent. (*l*). But if the personal representative has committed a direct breach of trust or been guilty of misconduct, he will be charged after the rate of five per cent. (*m*). It is to be observed that the higher rate of interest charged in such cases, is charged, not by way of punishment (*n*), but upon the principle above stated.

Compound interest.

When an executor or administrator is charged with interest, as a general rule he is charged with simple interest only, but in some cases he has been charged with compound interest. Here, again, compound

(*g*) *Treves* v. *Townshend*, 1 Bro. C. C. 385; *Re Jones, Jones* v. *Searle*, 49 L. T. 91.

(*h*) *Att.-Gen.* v. *Alford*, 4 De G. M. & G. 843, 851.

(*i*) *Att.-Gen.* v. *Köhler*, 9 H. L. Cas. 654, 680.

(*k*) *Re Barclay, Barclay* v. *Andrew*, [1899] 1 Ch. 683, at p. 686. See *ante*, p. 444.

(*l*) *Jones* v. *Foxall*, 15 Beav. 388; *Att.-Gen.* v. *Alford*, 4 De G. M. & G. 843; *Re Hulkes, Powell* v. *Hulkes*, 33 Ch. D. 552.

(*m*) *Jones* v. *Foxall, supra*; *Vyse* v. *Foster*, L. R. 8 Ch. App. 309: *Re Davis, Davis* v. *Davis*, [1902] 2 Ch. 314.

(*n*) *Att.-Gen.* v. *Alford, supra*; *Vyse v. Foster, supra*, at p. 333.

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interest has been charged, not on the ground of inflicting any punishment upon the executor or administrator for misconduct, but on the ground that, under the circumstances of the particular case, the Court is entitled to presume that he did receive or might have received benefits for which compound interest is an equivalent (*o*). In cases where compound interest has been charged, there has generally been an express direction for accumulation contained in the will, in violation of which the personal representative has taken the assets and employed them in trade or speculation for his own benefit; and in such cases interest has been charged at five per cent. or at four per cent., now three per cent. (*p*), according to the circumstances of the particular case (*q*).

Allowances.

A personal representative will be allowed in account for all payments and expenses properly made and incurred by him in due course of administration.

Payments to agents.

Thus, a personal representative will be allowed payments made to agents who have been employed by him to do acts or render services in connection with the estate in any case in which a provident owner would have employed such persons (*r*), provided he has exercised a reasonable discretion in fixing the amount of the remuneration.

A personal representative may employ steward or bailiffs (*s*), and agents to collect rents where the rents are numerous and the collection is troublesome (*t*);

(*o*) *Att.-Gen.* v. *Alford*, 4 De G. M. & G. 843; *Walker* v. *Woodward*, 1 Russ. 107.

(*p*) *Re Barclay, Barclay* v. *Andrew*, [1899] 1 Ch. 683.

(*q*) *Raphael* v. *Boehm*, 13 Ves. 407, 590; *Dornford* v. *Dornford*, 12 Ves. 127; *Knott* v. *Cottee*, 16 Beav. 77. See *Burdick* v. *Garrick*, L. R. 5 Ch. App. 233, 242; *Re Emmet's Estate, Emmet* v. *Emmet*, 17 Ch. D. 142.

(*r*) *Wilkinson* v. *Wilkinson*, 2 Sim. & St. 237; *Hopkinson* v. *Roe*, 1 Beav. 180.

(*s*) *Re Whiteley, Learoyd* v. *Whiteley*, 12 App. Cas. 727.

(*t*) *Wilkinson* v. *Wilkinson*, *supra*; *Hopkinson* v. *Roe*, *supra*; *Re Corsellis, Lawton* v. *Elwes*, 34 Ch. D. 675, 681 [C. A.].

and if the accounts are intricate, he may employ a professional accountant (*u*). So, he may employ a solicitor to transact legal business relating to the estate (*x*), but not to transact business which, not being strictly professional, he should do himself (*y*).

No remuneration for trouble.

Personal representatives, as a rule, will be allowed only out-of-pocket expenses. They will not be allowed to make any profits for themselves out of their trust; and, accordingly, however onerous the duties of management of the estate may be, they will not be entitled to any remuneration for their trouble, or to any allowance beyond necessary and proper expenses actually paid by them (*z*). A plea that they derive no benefit from their office, but that it is merely honorary, is no excuse for want of fidelity and diligence in carrying out the duties of their trust (*a*). The fact that by their diligence and exertions the value of the estate has been preserved or increased, gives them no claim to remuneration (*b*); and, if they retain out of the rents and profits any compensation or remuneration for their trouble and services, they will be compellable to refund it (*c*).

Professional charges.

Thus, a personal representative will not generally be allowed, as against creditors, to charge for professional services (*d*).

(*u*) *Henderson* v. *M'Iver*, 3 Madd. 275.

(*x*) *Re Bird*, *Oriental Commercial Bank* v. *Savin*, L. R. 16 Eq. 203; *Re Whiteley*, 12 App. Cas. 727.

(*y*) *Harbin* v. *Darby*, 28 Beav. 325; *Re Chapple*, *Newton* v. *Chapman* 27 Ch. D. 584. See *Re Weall*, *Andrews* v. *Weall*, 42 Ch. D. 674. See as to representative's liability for acts of agents, *ante*, pp. 445, 446.

(*z*) *Robinson* v. *Pett*, 3 P. Wms. 249; *Brocksopp* v. *Barnes*, 5 Madd. 90. See *Re Barber*, *Burgess* v. *Vinnicome*, 34 Ch. D. 77.

(*a*) *Charitable Corporation* v. *Sutton*, 2 Atk. 405.

(*b*) *Robinson* v. *Pett*, *supra*; *Langstaffe* v. *Fenwick*, 10 Ves. 404; 8 R. R. 8; *Barrett* v. *Hartley*, L. R. 2 Eq. 789.

(*c*) *Re Bedingfield*, *Bedingfield* v. *D'Eye*, 57 L. T. (N.S.) 332.

(*d*) *New* v. *Jones*, 1 Mac. & G. 668 n.; *Burge* v. *Brutton*, 2 Hare, 373; *Re Barber*, *Burgess* v. *Vinnicome*, *supra*; *Re White*, *Pennell* v. *Franklin*, [1898] 1 Ch. 297. See *Matthison* v. *Clarke*, 3 Drew. 3.

Chap. 20.

As against beneficiaries, however, an executor will be allowed to charge for professional services if so authorised by the will (*e*), unless he was an attesting witness thereto (*f*). The will may also contain a direction, to which due effect will be given, that any trustee who is a solicitor or other professional person shall be entitled to charge not only for his professional services as a solicitor or other professional person, but also for his time and trouble as a trustee (*g*); but the testator's intention to authorise a professional person to charge for his time and trouble outside his profession as distinguished from work done in the course of his profession, whether or not in the ordinary course thereof, must be clearly expressed (*h*). Where "professional charges" alone are mentioned in the will, no allowance will be made for charges not strictly professional (*i*).

Interest on money advanced by representative.

A personal representative will be allowed in account for interest paid by him upon money which he has borrowed, or for interest upon money advanced by him out of his own pocket, for the purposes of administration (*k*).

Costs of actions.

A personal representative is, as a general rule, entitled to the costs of action out of the estate (*l*). Even though he makes a mistake, even though he endeavours to charge against the estate items which the law does not allow him to charge, or where the endeavour to prove them has been defeated with costs, still he may

(*e*) *Re Chapple, Newton* v. *Chapman*, 27 Ch. D. 584.

(*f*) *Re Barber, Burgess* v. *Vinnicome*, 31 Ch. D. 665; *Re Pooley*, 40 Ch. D. 1 [C. A.].

(*g*) *Willis* v. *Kibble*, 1 Beav. 559; *Re Ames, Ames* v. *Taylor*, 25 Ch. D. 72; *Re Fish, Bennett* v. *Bennett*, [1893] 2 Ch. 413 [C. A.].

(*h*) *Clarkson* v. *Robinson*, [1900] 2 Ch. 722.

(*i*) *Re Chapple, supra*. See *Harbin* v. *Darby*, 28 Beav. 325.

(*k*) *Gordon* v. *Trail*, 8 Pr. 416; *Biggar* v. *Eastwood*, 15 L. R. Ir. 219; *Finch* v. *Pescott*, L. R. 17 Eq. 554. But see *Lewis* v. *Lewis*, 13 Beav. 82.

(*l*) See Morgan and Wurtzburg, pp. 339 *et seq.*

have his costs if they have been incurred without impropriety or fraud (*m*).

Where the personal representative has himself acted as solicitor in the action, he will be allowed to charge profit costs (*n*). This exception to the general rule that solicitors shall not be allowed to receive remuneration for business done in connection with the trust of administration, applies not only to proceedings in a hostile suit, but also to friendly proceedings in chambers (*o*).

(*m*) *Re Jones, Christmas* v. *Jones*, [1897] 2 Ch. 190, 198.

(*n*) *Cradock* v. *Piper*, 1 Mac. & G. 664; *Re Barber, Burgess* v. *Vinnicome*, 34 Ch. D. 77.

(*o*) *Re Corsellis, Lawton* v. *Elwes*, 34 Ch. D. 675.

APPENDIX.

LAND TRANSFER ACT, 1897.

(60 & 61 Vict. c. 65.)

An Act to establish a Real Representative, and to amend the Land Transfer Act, 1875. [6th August 1897.]

Whereas it is expedient to establish a real representative, and to amend the Land Transfer Act, 1875, in this Act referred to as "the principal Act": 38 & 39 Vict. c. 87.

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Part I.

Establishment of a Real Representative.

Devolution of legal interest in real estate on death.

1.—(1) Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

(2) This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him.

(3) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

(4) The expression "real estate," in this part of this Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

(5) This section applies only in cases of death after the commencement of this Act.

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Provisions as to administration.

2.—(1) Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.

(2) All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate.

(3) In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies.

(4) Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next-of-kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate.

Provision for transfer to heir or devisee.

3.—(1) At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for

all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance.

(2) At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives.

(3) Where the personal representatives of a deceased person are registered as proprietors of land on his death, a fee shall not be chargeable on any transfer of the land by them unless the transfer is for valuable consideration.

(4) The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land shall authorise the registrar to register the person named in the assent as proprietor of the land.

Appropriation of land in satisfaction of legacy or share in estate.

4.—(1) The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court.

(2) Where any property is so appropriated a conveyance thereof by the personal representatives to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or towards the satisfaction of a legacy or a share in the residuary estate, be liable to any higher

Appendix.

stamp duty than that payable on a transfer of personal property for a like purpose.

(3) In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorise the registrar to register the person to whom the property is appropriated as proprietor of the land.

Liability for duty.

5. Nothing in this part of this Act shall affect any duty payable in respect of real estate or impose on real estate any other duty than is now payable in respect thereof.

* * * * *

PART IV.

Miscellaneous.

* * * * *

Interpretation.

24.—(1) All hereditaments, corporeal and incorporeal, shall be deemed land within the meaning of the principal Act and this Act, except that nothing in this Act shall render compulsory the registration of the title to an incorporeal hereditament, or to mines or minerals apart from the surface, or to a lease having less than forty years to run or two lives yet to fall in, or to an undivided share in land, or to freeholds intermixed and indistinguishable from lands of other tenure, or to corporeal hereditaments parcel of a manor, and included in a sale of the manor as such.

(2) In this Act the expression "personal representative" means an executor or administrator.

Commencement of Act.

25. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-eight.

Short title and construction.

26. This Act may be cited as the Land Transfer Act, 1897, and shall be construed as one with the principal Act, and that Act and this Act may be cited together as the Land Transfer Acts, 1875 and 1897.

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